Supreme Court, U.S.
FILED
93 1830 MAY 16 1994
OFFICE OF THE CLERK

No. _____

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1993

DONALD G. SPENCER,

*Petitioner,*

v.

JESSE BROWN, SECRETARY OF VETERANS AFFAIRS,

*Respondent.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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166 pp

## QUESTIONS PRESENTED

The statutory scheme for the award of medical and disability benefits to veterans is designed to operate without formal res judicata effect. A rejected claim can be considered again (1) if "new and material evidence" is presented, 38 U.S.C. § 5108 (Supp. IV 1992), or (2) if there is an intervening, "liberalizing" law passed or regulation adopted that provides a basis for an award -- in which case the actual benefits may be retroactive for one year. 38 U.S.C. § 5110(g) (Supp. IV 1992); 38 C.F.R. § 3.114 (1993)

The questions presented are whether the Court of Appeals for the Federal Circuit erred,

(a) In holding that the Veterans Judicial Review Act of 1988, Pub. L. No. 100-687, 102 Stat. 4105 (1988) ("VJRA") -- which introduced profound reforms for the benefit of veterans in pursuit of their claims -- should not be applied retroactively and was not such a liberalizing law that would authorize consideration of a previously denied claim, because the VJRA was "unmistakably procedural," rather than substantive.

(b) In holding that the VJRA's replacement of a provision that had allowed a veteran to reopen his claim by presenting new and material evidence from service department "official reports," 38 U.S.C. § 4004(b) (1982) by a provision that allowed such evidence from <u>any</u> source, 38 U.S.C. § 5108 (Supp. IV 1992) did not require a reopening of a veteran's

claim that had to rely and had relied principally on evidence extrinsic to such official reports; and

(c) In deciding the foregoing questions in a manner wholly inconsistent with Landgraf v. USI Film Products, 62 USLW 4255, to be reported at 114 S. Ct. 1483 (April 26, 1994).

## TABLE OF CONTENTS

Page

QUESTIONS PRESENTED . . . . . i

TABLE OF AUTHORITIES . . . . . v

OPINIONS BELOW . . . . . 2

JURISDICTION . . . . . 2

STATUTORY AND REGULATORY PROVISIONS INVOLVED . . . . . 3

STATEMENT . . . . . 11

REASONS FOR GRANTING THE PETITION . . 26

CONCLUSION . . . . . 46

## TABLE OF AUTHORITIES

### CASES

Bradley v. Richmond School District, 416 U.S. 696 (1969) . . . . . 33

Chevron U.S.A., Inc. v. National Resources Defense Council, Inc., 467 U.S. 837 (1984) . . . . . 44

Colvin v. Derwinski, 1 Vet. App. 171 (1991) . . . . 13

Gilbert v. Derwinski, 1 Vet. App. 49 (1990) . . . . . 13

Landgraf v. USI Film Products, 62 U.S.L.W. 4255 to be reported at 114 S. Ct. 1483 (April 26, 1994) . . . passim

Livingston v. Derwinski, 959 F.2d 224 (Fed. Cir. 1992) . 40

Sullivan v. Everheart, 494 U.S. 83 (1990) . . . . . 43

United States v. Nordic Village, Inc., 112 S. Ct. 1011 (1992) . . . . . 40

Vitarelli v. Seaton, 359 U.S. 535 (1959) . . . . . 43

Walters v. National Association of Radiation Survivors, 473 U.S. 305 (1985) . . . . . 34

**STATUTES**

28 U.S.C. § 1254(1) . . . . . 2

38 U.S.C. § 5.08 (Supp. IV 1992) . . 10

38 U.S.C. § 211(a) (1982), . . . . . 13

38 U.S.C. § 1110 (Supp. IV 1992) . . 12

38 U.S.C. § 1112 (Supp. IV 1992) 12, 17

38 U.S.C. § 1114 (Supp. IV 1992) . . 12

38 U.S.C. § 1155 (Supp. IV 1992) . . 12

38 U.S.C. § 4004(b) (1982) . . . passim

38 U.S.C. § 5107 . . . . . 32

38 U.S.C. § 5108 (Supp. IV 1992) . . . . . passim

38 U.S.C. § 5110 (Supp. IV 1992) . . . . . passim

38 U.S.C. § 7104 (Supp. IV 1992) . . . . 8, 13, 31, 32

38 U.S.C. § 7105 (Supp. IV 1992) . . 39

38 U.S.C. § 7292 (Supp. IV 1992) 31, 40

38 C.F.R. § 3.114 (1993) . . 1, 4, 29, 34

IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1993

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Donald G. Spencer,

Petitioner,

v.

Jesse Brown
Secretary of Veteran Affairs,

Respondent.

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PETITION FOR WRIT OF CERTIORARI
TO
THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

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Donald G. Spencer respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

## OPINIONS BELOW

The opinion of the United States Court of Appeals (Appendix ("App.") 2-23) is reported at 17 F.3d 368.

The opinion of the United States Court of Veterans Appeals (App. 24-92) is reported at 4 Vet. App. 283.

The opinion of the Board of Veterans' Appeals (App. 93-111) is unreported.

## JURISDICTION

The judgment of the Court of Appeals was entered on February 15, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. 38 U.S.C. § 5110 (Supp. IV 1992) provides in relevant part:

> **§ 5110. Effective dates of awards**
>
> (a) Unless specifically provided otherwise in this chapter, the effective date of an award based on an original claim, a claim reopened after final adjudication, or a claim for increase, of compensation, dependency and indemnity compensation, or pension, shall be fixed in accordance with the facts found, but shall not be earlier than the date of receipt of application therefor.
>
> . . .
>
> (g) Subject to the provisions of section 5101 of this title, where

> compensation, dependency and indemnity compensation, or pension is awarded or increased pursuant to any Act or administrative issue, the effective date of such award or increase shall be fixed in accordance with the facts found but shall not be earlier than the effective date of the Act or administrative issue. In no event shall such award or increase be retroactive for more than one year from the date of application therefor or the date of administrative determination of entitlement, whichever is earlier.

The current regulation implementing § 5110, 38 C.F.R. § 3.114 (1993), provides in relevant part:

**§ 3.114 Basic pension determinations**

(a) Effective date of award. Where pension, compensation, or dependency and indemnity compensation is awarded or increased pursuant to a liberalizing law, or a liberalizing VA issue approved by the Secretary or by the Secretary's direction, the effective date of such award or increase shall be fixed in accordance with the facts found, but shall not be earlier than the effective date of the act or administrative issue. In order to be eligible for a retroactive payment under the provisions of this paragraph the evidence must show that the claimant met all eligibility criteria for the liberalized benefit on the effective date of the liberalizing law or VA

> issue and that such eligibility existed continuously from that date to the date of claim or administrative determination of entitlement. The provisions of this paragraph are applicable to original and reopened claims as well as claims for increase.

2. Prior to passage of Public Law 100-687, 102 Stat. 1405 (1988) (the "VJRA"), jurisdiction of the Board of Veterans Appeals was provided by 38 U.S.C. § 4004 (1982):

> **§ 4004. Jurisdiction of the Board**
>
> (a) All questions on claims involving benefits under the laws administered by the Veterans' Administration shall be subject to one review on appeal to the

Administrator. Final decisions on such appeals shall be made by the Board.

(b) When a claim is disallowed by the Board, it may not thereafter be reopened and allowed, and no claim based upon the same factual basis shall be considered; however, where subsequent to disallowance of a claim, new and material evidence in the form of official reports from the proper service department is secured, the Board may authorize the reopening of the claim and review of the former decision.

(c) The Board shall be bound in its decisions by the regulations of the Veterans' Administration, instructions of the Administrator,

and the precedent opinions of the chief law officer.

(d) The decisions of the Board shall be in writing and shall contain findings of fact and conclusions of law separately stated.

3. Jurisdiction of the Board of Veterans' Appeals is currently conferred by 38 U.S.C. § 7104 (Supp. IV 1992), which provides in relevant part:

**§ 7104. Jurisdiction of the Board**

(a) All questions in a matter which under section 211(a) of this title is subject to decision by the Secretary shall be subject to one review on appeal to the Secretary. Final decisions on such appeals shall be made by the Board. The Board shall decide any such appeal only

after affording the claimant an opportunity for a hearing. Decisions of the Board shall be based on the entire record in the proceeding and upon consideration of all evidence and material of record and applicable provisions of law and regulation.

(b) Except as provided in section 5108 of this title, when a claim is disallowed by the Board, the claim may not thereafter be reopened and allowed and a claim based upon the same factual basis may not be considered.

(c) The Board shall be bound in its decisions by the regulations of the Department, instructions of the Secretary, and the precedent opinions of the chief legal officer of the Department.

(d) Each decision of the Board shall include --

(1) a written statement of the Board's findings and conclusions, and the reasons or bases for those findings and conclusions, on all material issues of fact and law presented on the record; and

(2) an order granting appropriate relief or denying relief.

4. 38 U.S.C. § 5.08 (Supp. IV 1992) provides as follows:

**§ 5108. Reopening disallowed claims**

If new and material evidence is presented or secured with respect to a claim which has been disallowed, the Secretary shall reopen the claim and review the former disposition of the claim.

## STATEMENT

Petitioner ("Mr. Spencer") is a veteran who served on active duty in the United States Armed Forces from March 1944 to February 1946. He is largely dependant upon a wheelchair because he has multiple sclerosis ("MS"), a progressively debilitating disease in which neural sheaths are replaced by scar tissue. MS is notable for its extended periods of latency, remission and undiagnosed presence. During and shortly after petitioner's active military service, Mr. Spencer suffered back ailments, lower-limb motion irregularities and other ailments, all of undiagnosed origin. The service records that still exist show that when Mr. Spencer complained of backaches during his active duty, the examining physician

did not order neurological examinations. After years of unsuccessful efforts to have his condition determined, he was diagnosed with MS in 1976.

Beginning in 1976, Mr. Spencer filed the first of a number of claims with the Veterans Administration ("VA")[1/] for medical benefits based upon his MS, in which he provided evidence as to its "service connection."[2/] All of his efforts, catalogued infra, were unsuccessful.

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1/ The Veterans Administration is now organized as the Department of Veterans Affairs, and before 1930 was the Veterans Bureau. All are referred to herein as the VA.

2/ Proof of "service connection" -- that is, a manifestation of a disease during service or within some designated period thereafter -- entitles a veteran to a compensation based on the impairment resulting from the disease. 38 U.S.C. §§ 1110, 1112, 1114, 1155 (Supp. IV 1992).

Prior to 1988, the VA system for determining the award of medical and disability benefits was characterized by procedural "informality," supposedly for the benefit and protection of veterans. The system lacked rudimentary procedural disciplines. The VA, for example, was not required to provide written analyses of, or rationales for, its determinations (compare 38 U.S.C. § 7104(d)(1) (Supp. IV 1992) with 38 U.S.C. § 4004(d) (1982)); to evaluate the probative value of evidence, see Gilbert v. Derwinski, 1 Vet. App. 49, 56 (1990); to base determinations regarding medical issues on record evidence, see Colvin v. Derwinski, 1 Vet. App. 171, 175 (1991); or to make a record adequate for judicial review, since judicial review was not allowed. See 38 U.S.C. § 211(a) (1982), superseded by

38 U.S.C. § 7292 (Supp. IV 1992). Further, the statute, on its face, allowed a veteran to seek reopening of a previously denied claim on the basis of new evidence only "in the form of official reports from his service department," 38 U.S.C. § 4004(b) (1982) -- thus making testimonial and other extrinsic evidence legally incompetent to support a reopening.

Congress ultimately decided that the supposedly wholesome informality of the VA system in fact resulted in both actual and perceived unfairness to veterans. (134 Cong. Rec. 16642-16643 (daily ed. Oct. 18, 1988) (statement of Sen. Cranston.) In response, it passed the Veterans' Judicial Review Act of 1988 ("VJRA"), Pub. L. No. 100-687, 102 Stat. 4105 (1988). The VJRA added a number of significant protections

for a veteran in the presentation of his claim, noted infra, and granted the right of judicial review.

Under pre-VJRA law, it was particularly characteristic of the VA's disposition of disfavored claims that the VA would give a detailed recital of the veteran's evidence, without analysis or other substantive discussion, and follow it by a denial of the claim that was based on declarations supporting the opposite conclusion.[3/] The history of Mr.

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3/ As the VA has characterized its previous practice,

> If in the past a claimant submitted unsupportable or unpersuasive evidence our decisions would cite the claimant's evidence and then proceed to discuss the other pieces of evidence which would lead to the opposite conclusion, without directly addressing the credibility of the veteran's evidence.

(continued...)

Spencer's efforts to obtain benefits is typical of pre-VJRA denials of disfavored claims and reflects that he was repeatedly frustrated by the VA's use of "informality" to deflect the evidence he offered. His ordeal is summarized as follows:

(a) In 1976 Mr. Spencer filed a claim with the regional office of the VA for service-connected disability compensation for MS, supported by a medical opinion stating that the patient's medical history was suggestive of the possibility of a first MS attack in 1945. In response, the VA regional office on November 8, 1976 determined that there was

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3/(...continued)
Statement of the Deputy Secretary of Veterans Affairs in the Subcommittee on Compensation, Pension and Insurance, Committee of Veterans Affairs, House of Representatives, March 18, 1992, at 4.

"no evidence what so ever" [sic] to connect Mr. Spencer's problems while in the service or within the "seven-year presumptive period."[4/]

(b) Mr. Spencer submitted additional evidence in March 1977, including the statement of a fellow serviceman as to Mr. Spencer's back ailments and odd "short step and heel and toe" motion manifested during service, as well as a second medical opinion stating that patient's history evidenced the "probability" that Mr. Spencer incurred the disease in the spring of 1945. To this, the VA regional office responded that there was "no

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4/ Pursuant to 38 U.S.C. § 1112(a)(4) (Supp. IV 1992), the manifestation of 10 percent disability resulting from MS within seven years following discharge from active duty raises the presumption that the condition existed while in service.

evidence" that Mr. Spencer had incurred MS while in the service or within seven years thereafter.

(c) In May 1977, Mr. Spencer testified at a VA hearing with regard to his early back and leg problems and submitted additional evidence, including the neurologist's letter of December 30, 1975, that had triggered his claim and that noted, inter alia, Mr. Spencer's increasingly "spastic gait." To this, the regional board responded (without citation of medical evidence) that his MS was unrelated to his prior back and leg problems and that there was no "reasonable probability" that such problems were a basis for establishing service connection.

(d) In September 1977 Mr. Spencer supplied additional testimony regarding his early problems. In November 1977, Mr.

Spencer appealed to the Board of Veterans' Appeals (BVA). He subsequently underwent a special neurological examination that confirmed his MS and concluded that its onset might have occurred in 1945, but that the absence of documentation in his official records barred a certain determination. On May 29, 1978, the BVA denied Mr. Spencer's claim, relying principally upon his official separation medical examination records in 1946 and without evaluating his extrinsic evidence. The BVA summarily dismissed Mr. Spencer's expert medical evidence on the basis that the official records of his 1946 and 1947 post-service examinations did not record neurological abnormalities (even though no neurological examination had been conducted at that time). Upon Mr. Spencer's request for reconsideration, the

BVA affirmed its May 1978 decision in a Final Decision issued on January 10, 1980.

(e) In 1983 Mr. Spencer sought to reopen his claim by advancing "new and material" evidence, seeking to satisfy 38 U.S.C. § 4004(b) (1982) (now, as amended, 38 U.S.C. § 5108 (Supp. IV 1992)). Two lay witnesses described his lack of leg control, excessive fatigue, and certain eye problems during the immediate post-war period. Further, a neurologist offered detailed testimony, including epidemiological data and age-based disease progress studies, concluding that there was "a high degree of medical probability" that Mr. Spencer's MS commenced during military service and indeed, that "the facts can be interpreted in no other way." To this, the VA regional office responded that "no new and

material evidence" had been furnished "to provide a factual basis for reconsideration." On October 4, 1984, the BVA affirmed, reciting that the additional evidence did not "constitute a new factual basis" establishing a service connection.

(f) On March 30, 1987, the BVA denied a request by Mr. Spencer based on his Air Force Reserve service to reopen his claim. The denial rested principally on the ground that Mr. Spencer's complaints were not recorded in his official service records and, thus, did not constitute "objective evidence."

(g) On November 18, 1988, Congress passed the VJRA. After passage of the VJRA, Mr. Spencer filed his claim again and testified on May 2, 1989 at a VA regional office hearing. The regional office denied his claim for want of "new

and material evidence" and discounted his oral testimony on the basis that it did not constitute "documentary medical evidence of treatment" for MS in, or shortly after, military service.

(h) Mr. Spencer filed a Notice of Disagreement and appealed to the BVA. On July 23, 1990, the BVA denied Mr. Spencer's appeal on the basis that the earlier decisions were final, that no new factual basis had been presented, and that the medical opinion evidence was not "confirmed" by contemporaneous official records. (App. 93-111.)

Mr. Spencer appealed to the Court of Veterans Appeals ("CVA") on August 10, 1990, asserting, inter alia, (1) that he was entitled to de novo review of the evidence he had previously submitted because the passage of the VJRA created a

new basis for his claim and that review was thus required in accordance with 38 U.S.C. § 5110(g); and (2) that, because prior to the VJRA, the VA could under the applicable statute consider only evidence contained in "official reports from the proper service department" -- and not from other sources -- in determining whether to reopen a claim, the extrinsic evidence resubmitted by Mr. Spencer should be deemed "new and material evidence" that entitled him to de novo consideration under 38 U.S.C. § 5108. His appeal was denied. (App. 24-92.)

The Court of Appeals for the Federal Circuit affirmed. (App. 1-23.) It noted correctly that a claim based upon the same factual foundation as one previously denied may be considered where "new and material evidence" is presented. 38

U.S.C. § 5108. It also noted (and the VA concedes) that there is an additional exception available under 38 U.S.C § 5110(g) when there is an intervening liberalizing change in the statutory or regulatory basis for the veteran's claim. However, the court below incorrectly held that such a change must be substantive, not procedural. (App. 15-16.)

The Court of Appeals made an additional holding in rejecting Mr. Spencer's claim. As noted, the pre-VJRA version of the statute authorized the BVA to reopen a disallowed claim upon the filing of new and material evidence "in the form of official reports from the proper service department" of the military. 38 U.S.C. § 4004(b) (1982). Without undertaking any analysis of its own, the Court noted the CVA's conclusion

that the BVA had a "practice" of considering extrinsic evidence, and the court accepted the CVA's circuitous analysis that purported to find an "ambiguity" in former § 4004(b) that, it said, legitimized the alleged practice. (App. 21-22.) The Court of Appeals thus accepted the CVA's conclusion that extrinsic evidence submitted by Mr. Spencer could legitimately have been considered by the VA under pre-VJRA law (but not that it was actually considered in his case), and thus that Mr. Spencer's proffer in 1990 could not be considered "new and material evidence" that authorized de novo consideration. Accordingly, it affirmed the denial of his claim.

REASONS FOR GRANTING THE PETITION

Instead of conducting the type of retroactivity analysis required by Landgraf v. USI Film Products, 62 U.S.L.W. 4255, to be reported at 114 S. Ct. 1483 (April 26, 1994), in order to determine whether Mr. Spencer should benefit from the VJRA, the Court of Appeals for the Federal Circuit relied upon a single, mechanical distinction between "substantive" and "procedural" laws, for which it cited no authority. Moreover, it stood the import of the distinction on its head, holding that procedural improvements should not be available retroactively, contrary to Landgraf. As a result, the court improperly limited the benefits of the VJRA -- a result made even more incongruous by its conflict with the underlying statutory scheme, which is

designed to give veterans the benefit of changes in the law as they occur. Moreover, the court's additional holding that Mr. Spencer's proffer of extrinsic evidence in 1989, receipt of which was unauthorized until enactment of the VJRA, did not constitute "new and material" evidence rested on a manifestly fictive "ambiguity" in the prior law.

The legislative history of the VJRA noted that many veterans' claims were denied in a manner that could not pass elementary tests of decisional and procedural fairness (Statement of Senator Cranston, supra) and in an atmosphere of confusion and uncertainty as to actual VA practice. Committee on Veterans' Affairs, Report on Veterans' Administration Adjudication Procedure and Judicial Review Act at 32-34 (1988). A rejection of the

lower court's statutory interpretation is of critical importance to a large segment of the population that is uniquely deserving. Absent the passage of further legislation, the decision below will permanently prevent these veterans from receiving the fair hearing, subject to the discipline of judicial review, that Congress intended. The decision below is erroneous and warrants review by this Court.

1. The statutory scheme for veterans' benefits is structured such that a change in a statute or regulation that provides a new basis for the award of, or increase of, benefits is made available to a veteran regardless of when his claim was submitted to, or how it was previously acted upon by, the VA. As conceded by the VA below, a claimant may avoid the

limitations on reconsidering denied claims by showing that a statutory or regulatory change occurring subsequent to the prior VA denial creates a new basis for entitlement. Brief for Respondent-Appellee Jesse Brown, September 15, 1993, in Spencer v. Brown, No. 93-7073 (Fed. Cir.), at 11.[5/] Specifically,

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5/ The corresponding VA regulation, 38 C.F.R. § 3.114(a) (1993), states:

> (a) Effective date of award. Where pension, compensation, or dependency and indemnity compensation is awarded or increased pursuant to a liberalizing law, or a liberalizing VA issue approved by the Secretary or by the Secretary's direction, the effective date of such award or increase shall be fixed in accordance with the facts found, but shall not be earlier than the effective date of the act or administrative issue. . . . The provisions of this paragraph are applicable to original and reopened claims as well as claims for increase.

Section 5110(g) sets the effective date of any such new award at a time not earlier than the effective date of the new statute or regulation. Further, Section 5110(g) limits the retroactivity of any benefits pursuant thereto to a period of one year.

2. The Court of Appeals, however, characterized the availability of judicial review and other changes effected by the VJRA as "procedural," and then held that Section 5110(g) does not embrace procedural changes, however significant. (App. 15-16.) Thus, if the 1988 law had enacted a minor substantive adjustment in, e.g., the type of symptoms that would be given recognition in establishing the onset of MS, the Court of Appeals (and the CVA) would have allowed Mr. Spencer to present his evidence for de novo consideration. However, although the

scope and impact of the VJRA were far more profound in respect to Mr. Spencer's claim, the Court of Appeals (and the CVA), characterizing the VJRA as "procedural," would bar Mr. Spencer from receiving a de novo consideration.

3. The VJRA enacted numerous reforms and forced the implementation of other reforms in the adjudication of veterans' benefits. It, inter alia, (a) put an end to the VA's freedom from judicial oversight, by providing for review of agency decisions in the federal courts, 38 U.S.C. § 7292; required the BVA to provide a written statement of findings and conclusions that explained and evaluated the evidence presented, 38 U.S.C. § 7104(d)(1); and codified certain requirements such as the right to a finding based on all the evidence of

record (38 U.S.C. § 7104(a)) and the burden of proof (38 U.S.C. § 5107). In addition, the VJRA permitted a final decision to be reopened if new and material evidence is submitted from any source. 38 U.S.C. § 5108.

As indicated, supra, Mr. Spencer's claim was addressed by the BVA using the wooden and now rejected technique of recounting his evidence without evaluating it, and by reaching conclusions based on matters not in evidence. Further, Mr. Spencer's extrinsic evidence was denigrated by the VA as insufficient precisely because it was not reflected in official service reports.

4. This Court's Landgraf decision developed a framework for determining the circumstances in which a new law should be retroactively applied and thus sought to

resolve the "apparent tension" between cannons of statutory construction regarding the retroactive effect of intervening changes in the law -- one cannon disfavoring retroactivity and the other favoring it by requiring application of the law in effect when a decision is rendered. Landgraf, 62 USLW at 4261. Landgraf requires, first, a determination of whether there is any expression of legislative intent as to retroactive application. Id. at 4265. If the intent is not entirely clear, it then requires a consideration of the practical effects of, and the fairness to the parties involved of, retroactive application. Id. at 4266; see also Bradley v. Richmond School District, 416 U.S. 696, 712 (1969).

Here, it is notable that the VA benefits system is designed to operate

with "no formal res judicata effect," Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305, 311 (1985). A veteran may obtain new consideration of his claim (1) if new, material facts become available or (2) if a law or regulation governing his claim is liberalized. 38 U.S.C. §§ 5108, 5110(g); 38 C.F.R. § 3.114; see also the decision below, at App. 12. Faced with this legislative amenability toward reconsideration of claims and retroactive award of benefits, the Court of Appeals erred in creating a mechanical distinction to defeat the application of the VJRA to Mr. Spencer's claim.

Instead, the court should have held, consistently with the analysis prescribed by Landgraf, that Mr. Spencer's claim be

considered under VJRA standards, for the following reasons:

(a) Retroactive application would not involve any post facto imposition of new burdens on private rights or any undermining of public expectations as to the behavior required by law, see Landgraf, 62 USLW at 4263;

(b) Retroactivity would not impair a right any person possessed when he originally acted, would not increase a party's liability for past conduct, and would not impose new duties with respect to conduct already completed, see id. at 4266;

(c) To the extent the VJRA is deemed "procedural," only "secondary" conduct would be affected by retroactive application. That is, no serviceman or physician would be required to have

behaved differently here; only the subsequent review process would be affected, id. at 4264;

(d) To the extent that Congress determined that the pre-VJRA system operated with unfairness, it is unlikely that Congress intended that unfair treatment of older veterans, or of veterans with older claims, should remain unremedied;

(e) No "manifest injustice" could possibly result from retroactive application here. To the contrary, a more just result is the very objective of the VJRA, id. at 4265;

(f) Any compensation to a veteran arising from his or her being afforded a fair hearing would not require any particular private person to pay for injuries caused, but would result in a

remedy from public funds, where fairness requires it. Further, retroactive payments, if any, would be limited to one year, so that the sums involved would be modest, id. at 4266.

If anything, the distinction drawn by the Court of Appeals between "substantive" and "procedural" changes in the law undercuts its own conclusion and militates in favor of having petitioner's claim reconsidered within a domain of procedural fairness. Landgraf, 62 USLW at 4264.

5. Against this benign result is the argument that the VA would be required to bear the expense of reconsidering a number of claims denied under pre-VJRA law. It is not plausible, however, to contend that all, or even a great number of denied claims would be submitted for reconsideration. Many veterans claiming

medical or disability benefits have, regrettably, passed away; others will not be motivated to seek reconsideration, given the evidence developed in the initial review and their perception of the propensity of an agency to affirm. Further, witnesses will, in many cases, have become unavailable. Moreover, of those claims submitted for reconsideration, the government may fairly complain regarding only the claims subsequently denied, inasmuch as those granted under the new system of review should have been granted previously, had they been fairly considered. Finally, veterans' benefit cases have enough structural similarity and are otherwise subject to periodic reviews, so that efficient systems for reconsideration of

those cases that are refiled are already in place.[6/]

6. The Court of Appeals also apparently felt constrained to give the VJRA a narrow interpretation because it

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6/ The Court of Appeals, quite correctly, did not accept the government's contention below that Congress intended to limit any retroactive application of the VJRA by making the judicial remedies under the act applicable to "any case in which a notice of disagreement [i.e., a notice of appeal] is filed ... on or after the date of enactment of the Act," November 18, 1988. See Pub. L. No. 100-687, sec. 402; 38 U.S.C. § 7105 (Supp. IV 1992). In fact, any previously denied claim can now be refiled, and if denied, a notice of disagreement will thereupon be filed after the date of enactment, thereby achieving compliance with the aforesaid language.

Most likely, Congress meant merely to have procedural protections of the VJRA apply to cases refiled cases after enactment, in order to allow the VA a chance to review cases before judicial review is sought. Judicial review would not be available for prior decisions not brought again through the VA review process.

saw the VJRA as a waiver of sovereign immunity and a grant of jurisdiction, which, it said, must be strictly construed. (App. 17.) The case on which it relied as to sovereign immunity, however, United States v. Nordic Village, Inc., 112 S.Ct. 1011, 1014 (1992) bears no relationship to the veterans' benefit system, but rather concerns the breadth of an express waiver of immunity with respect to a post-petition transfer of funds in a bankruptcy proceeding. Livingston v. Derwinski, 959 F.2d 224, 225 (Fed. Cir. 1992), cited as to the jurisdiction issue, is equally irrelevant, as it deals with the jurisdictional provisions of the VJRA, 38 U.S.C. § 7292 (Supp. IV 1992), not the retroactivity provisions involved here. The design of the veterans' benefit statutes is so profoundly remedial and its

objective so humanitarian that it would be odd at best to characterize a liberalizing act of Congress, intended to be part of that scheme, as comprising primarily a waiver of sovereign immunity or a jurisdictional grant, to be narrowly construed. See Landgraf, 62 USLW at 4264.

The Court of Appeals also required that there must be an affirmative statement within the VJRA itself that it was intended to provide a basis for retroactive review. (App. 18.) That conclusion is clearly at odds with Landgraf, which requires, in circumstances where legislative intent is ambiguous, that a range of factors, noted above, be taken into consideration.

7. Finally, Mr. Spencer argued below that because under pre-VJRA law the BVA was authorized to reopen a previously

disallowed claim only on the basis of new evidence "in the form of official reports from the proper service department," 38 U.S.C. § 4004(b) (1982), the bulk of his evidence -- expert medical opinion, his sworn testimony, corroborative statements by third-party servicemen -- was not cognizable under the pre-VJRA rules. Thus, when such evidence was presented in 1989 and 1990, it should have been deemed "new and material" evidence that required a reopening of his case.

The VA, in response, contended that it had a pre-VJRA practice of accepting extrinsic evidence, and it noted that the legislative history recited that it was the BVA's "current" practice to authorize a reopening when the new evidence as received "from any source." Explanatory Statement on Compromise Agreement on

Division A of S. 11, 134 Cong. Rec. S., 16650, 16653 (1988), reprinted in 1988 USCCAN 5782, 5840. The CVA recognized, however, that even if there were such a prior "practice," it could not be advanced as a reason for precluding Mr. Spencer's claim if it were contrary to statute. App. 65; see Sullivan v. Everheart, 494 U.S. 83, 88-89 (1990); cf. Vitarelli v. Seaton, 359 U.S. 535, 539-40 (1959) (agency required to follow own procedures).

The CVA thereupon undertook a lengthy and circuitous discourse that purported to show that the pre-VJRA law requiring evidence be in the "official records" -- although clear on its face -- was nevertheless "ambiguous." (App. 61-91.) On review, the Court of Appeals' terse statement that it "perceived no error in

the legal analysis" of the CVA on this point (App. 21) conspicuously avoided any involvement in its substance; the court apparently threw up its hands on the matter and did not fulfill its responsibility to determine the meaning of the statute. See Chevron U.S.A., Inc. v. National Resources Defense Council, Inc., 467 U.S. 837 (1984).

Not only was the CVA's statutory "ambiguity" fictive, but also, the VA never established that its alleged practice of receiving extrinsic evidence had any application to Mr. Spencer's case. Regardless of the VA's alleged "general practice," here the denigration of Mr. Spencer's extrinsic evidence, precisely because its substance was not embodied in the official records, was repeated and pronounced.

Indeed, given that the pre-VJRA statute facially precluded consideration of extrinsic evidence, and given that the VA's prior informal system did not even require that evidence be evaluated on the record, if at all, it is impossible to conclude that extrinsic evidence was actually taken into account in any case, much less Mr. Spencer's -- or was not substantially discounted because of the language of § 4004(b). The pre-VJRA system's uncertain and unauthorized treatment of extrinsic evidence can hardly be relied upon as the basis for precluding its consideration now.

## CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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* Counsel of Record

# APPENDIX

IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1993

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Donald G. Spencer,

Petitioner,

v.

Jesse Brown
Secretary of Veteran Affairs,

Respondent.

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# APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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Counsel for Petitioner

United States Court of Appeals for the Federal Circuit

93-7073

DONALD G. SPENCER,

Claimant-Appellant,

v.

JESSE BROWN,
Secretary of Veterans Affairs,

Respondent-Appellee.

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DECIDED: February 15, 1994

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Before RICH and LOURIE, Circuit Judges, and MESKILL, Senior Circuit Judge.[1/]

LOURIE, Circuit Judge.

Donald G. Spencer appeals from the judgment of the United States Court of Veterans Appeals affirming the decision of the Board of Veterans' Appeals denying

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1/ Honorable Thomas J. Meskill, Senior Circuit Judge, U.S. Court of Appeals for the Second Circuit, sitting by designation.

Spencer's claim for compensation for an alleged service-connected disability. Spencer v. Brown, 4 Vet. App. 283 (1993). Because the Board was not required to review his claim de novo and Spencer failed to present new and material evidence warranting the reopening of his claim, we affirm.

BACKGROUND

Spencer served on active military duty from March 1944 to February 1946. In 1975, he was diagnosed with multiple sclerosis (MS), a degenerative nerve disease. In November 1976, Spencer filed a claim with a regional office of the Veterans Administration ("the agency") for service-connected disability compensation for MS.[2/] The claim was supported by a

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2/ Spencer had previously filed a claim for service-connected compensation for a backache on December 10, 1946. That

(continued...)

letter from a private physician suggesting the possibility that Spencer suffered his "first attack" of MS while on active duty in the spring of 1945. In view of the lack of evidence showing that the disability was incurred in or aggravated by his service in the military, the agency determined that Spencer's disability was not service connected and denied his claim. See 38 U.S.C. § 1110 (Supp. IV 1992); 38 C.F.R. § 3.303 (1993).

In March 1977, Spencer submitted additional medical and lay evidence supporting his contention that his disability was service connected. The evidence related to a back condition allegedly incurred by Spencer during his period of service, which continued to

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2/(...continued)
claim was denied by the agency on June 10, 1947.

cause him discomfort after his discharge. Spencer maintained that this back condition was symptomatic of MS and thus demonstrated that he suffered from MS during service or during the seven-year presumptive period subsequent to service. See 38 U.S.C. § 1112 (a) (4) (Supp. IV 1992) (seven-year presumptive period for MS). The agency, however, found that the record as supplemented remained inadequate to show that Spencer's MS disability was incurred or aggravated in line of duty. On May 27, 1977, the agency confirmed its decision to deny Spencer's claim for service connected disability compensation.

Spencer appealed the agency's decision to the Board of Veterans' Appeals.[3/] On May 24, 1978, the Board

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3/ Spencer expanded his appeal to include another claim for compensation for a service-connected back condition. That

(continued...)

denied Spencer's claim on the ground that "a reasonable probability that multiple sclerosis was present during service or within seven years thereafter has not been demonstrated." The Board subsequently reconsidered and affirmed its May 1978 decision in a final decision issued on January 10, 1980.

Spencer sought to reopen his claim in 1983 based on evidence that he alleged was "new and material" within the meaning of 38 U.S.C. S 5108 (Supp. IV 1992) (formerly 38 U.S.C. § 3008).[4] The Board, however, determined that the additional evidence

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3/(...continued)
claim was denied by the Board and is not at issue in the instant case.

4/ Pursuant to Pub. L. 102-40, 105 Stat. 238 (1991) and Pub. L. 102-83, 105 Stat. 238 (1991) certain provisions of Title 38, United States Code, were recodified. Reference will be made to the new section numbers in this opinion.

did not provide a new factual basis for allowing his claim, see 38 U.S.C. § 7104(b) (Supp. IV 1992) (formerly 38 U.S.C. § 4004 (b)); 38 C.F.R § 20.1105 (1993), and denied Spencer's request on October 4, 1984. Another request to reopen his claim based on new and material evidence was denied on similar grounds on March 30, 1987.

Finally, Spencer requested that his claim be reconsidered on the basis that the Board failed to give sufficient consideration to statements of private physicians and others concerning the purported manifestations of MS during service or the presumptive period thereafter. The Board rejected that argument and again denied his claim on July 23, 1990. The Board determined that its May 1978, October 1984, and March 1987 decisions were final and that no new

factual basis existed to warrant reopening of his claim.

Spencer appealed the July 1990 Board decision to the United States Court of Veterans Appeals on August 10, 1990.

Spencer argued that he was entitled to de novo review of his previously and finally disallowed claim, irrespective of whether new and material evidence had been presented. Specifically, Spencer asserted that the Veterans' Judicial Review Act of 1988 (VJRA), Pub. L. No. 100-687, 102 Stat. 4105 (1988), created a new substantive right of entitlement to disability compensation and that the Board was required to review his claim de novo under 38 U.S.C. § 5110(g) (Supp. IV 1992) (formerly 38 U.S.C. § 3010(g)), which, according to Spencer, provides an exception to the finality provision of 38 U.S.C. § 7104(b) where there has been a

statutory or regulatory change in veterans' benefits law affecting a previously and finally disallowed claim.[5/]

The Court of Veterans Appeals agreed that section 5110(g) "appears to be contingent upon, and thus to presuppose,

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5/ Section 5110(g), as the Court of Veterans Appeals recognized, "merely provides the means for determining the effective date of any award of VA benefits made pursuant to a liberalizing law or administrative issue. 4 Vet. App. at 288. The provision stipulates that

> where compensation, dependency and indemnity compensation, or pension is awarded or increased pursuant to any Act or administrative issue, the effective date of such award or increase shall be fixed in accordance with the facts found but shall not be earlier than the effective date of the Act or administrative issue. In no event shall such award or increase be retroactive for more than one year from the date of application therefor or the date of administrative determination of entitlement, whichever is earlier.

38 U.S.C. § 5110(g).

the existence" of a right to de novo adjudication of a previously and finally denied claim "where an intervening change in law or regulation has created a new basis of entitlement to a benefit." 4 Vet. App. at 288, 289. However, the court rejected Spencer's assertion that he was entitled to de novo review of his claim under the VJRA, because that legislation did not effect an intervening change in law that substantively affected Spencer's claim for service-connected disability compensation such that a new basis for entitlement was created. In affirming the Board's decision, the court also held that Spencer did not present new and material evidence justifying reopening of his previously and finally disallowed claim.

Spencer now appeals the decision of the Court of Veterans Appeals affirming the Board's denial of Spencer's claim. To

the extent that Spencer challenges the Board's interpretation of governing statutes and regulations, we have jurisdiction to hear his appeal under 38 U.S.C. § 7292(c) (Supp. IV 1992).

DISCUSSION

I. De Novo Review

Under the statutory scheme governing veterans' benefits claims, a claim that is finally denied by the Board "may not thereafter be reopened and allowed and a claim based upon the same factual basis may not be considered." 38 U.S.C. § 7104(b) (Supp. IV 1992). Thus, section 7104(b) precludes consideration of a previously and finally denied claim unless a new factual basis exists upon which benefits may be awarded. An exception to the finality provision of section 7104(b) arises only when "new and material evidence is presented or secured" which

establishes a new factual basis for entitlement to a claimed benefit. 38 U.S.C. § 5108.

Additionally, as the Court of Veterans Appeals recognized, "section 7104(b) does not preclude de novo adjudication of a claim, on essentially the same facts as a previously and finally denied claim, where an intervening and substantive change in law or regulation created a new basis for entitlement to a benefit." 4 Vet. App. at 289. In reaching this conclusion, the court reasoned that

> [w]hen a provision of law or regulation creates a new basis of entitlement to benefits, as through liberalization of the requirements for entitlement to a benefit, an applicant's claim of entitlement under such law or regulation is a claim separate and distinct from a claim previously and finally denied prior to the liberalizing law or regulation. The applicant's later claim, asserting rights which did not

> exist at the time of the prior claim, is necessarily a different claim.

Id. at 288-89.

Spencer insists that the VJRA instituted a comprehensive overhaul of the statutory scheme governing adjudication of claims for veterans' benefits and that the resulting change substantively affected the basis for establishing entitlement to his claimed benefits. Thus, in view of the "radical" changes in veterans' benefits law brought about by the enactment of the VJRA, Spencer argues that the Court of Veterans Appeals erred in failing to recognize his right to de novo review of his claim.

Whether the VJRA represented a "liberalizing" law, i.e., one which brought about a substantive change in the law creating a new and different entitlement to a benefit, is an issue of

statutory interpretation subject to our de novo review. See Travelstead v. Derwinski, 978 F.2d 1244, 1250 (Fed. Cir. 1992) (citing 38 U.S.C. § 7292 (Supp. IV 1992)). The ultimate objective when interpreting a statute is to give effect to the intent of Congress. See Gade v. National Solid Wastes Management Assn., 112 S. Ct. 2374, 2381-82 (1992). Our duty is "to find that interpretation which can most fairly be said to be imbedded in the statute, in the sense of being most harmonious with its scheme and with the general purposes that Congress manifested." National Labor Review Bd. v. Lion Oil Co., 352 U.S. 282, 297 (1957). In discharging that duty, we look not only to the relevant statutory language, but to the design of the statute as a whole and to its object and policy. See Crandon v.

United States, 110 S. Ct. 997, 1001 (1990).

It is clear that the VJRA instituted changes in the veterans' benefits system and expanded the rights of veterans relating to the adjudication of their claims, including the right to seek judicial review, the right to have reasonable doubt resolved in favor of the claimant, and the right to an agency decision based on the evidence of record. However, we do not agree that such changes provided Spencer with a new basis of entitlement to his claimed benefits. Although the changes occasioned by the enactment of the VJRA were indeed significant, such changes were unmistakably procedural in nature. Spencer's argument fails to appreciate that the reforms implemented by the VJRA were directed to improving the

adjudicative process and did not create new substantive rights to veterans' benefits. See generally, Barton F. Stichman, The Veterans' Judicial Review Act of 1988: Congress Introduces Courts and Attorneys to Veterans' Benefits Proceedings, 41 Admin. L. Rev. 365 (1989). The statutory provisions governing entitlement to an award of service-connected disability compensation for MS, 38 U.S.C. §§ 1110 (MS must have been incurred or aggravated in line of duty), 1112(a)(4) (seven-year presumptive period for MS), were not altered by the VJRA. Spencer does not identify any changes effected by the VJRA that substantively affected the nature of his claim such that it became different and distinct from the one previously denied by the Board.

We therefore hold that in the absence of a showing of a new basis of entitlement

to a claimed benefit as the result of an intervening change in law or regulation, de novo review of a previously and finally denied claim to veterans benefits is not available. Here, Spencer failed to make that showing.

Alternatively, Spencer argues that he is entitled to de novo review of his claim because there is no prohibition in the VJRA barring such review. We consider this argument to be devoid of merit. First, to the extent that the VJRA provides a waiver of sovereign immunity and a grant of jurisdiction, it must be construed narrowly. See United States v. Nordic Village, Inc., 112 S. Ct. 1011, 1014 (1992) (purported waivers of sovereign immunity must be narrowly construed); Livingston v. Derwinski, 959 F.2d 224, 225 (Fed. Cir. 1992) (jurisdictional statutes must be strictly

construed). Second, and more importantly, a positive basis for de novo review is required; it is not sufficient that there be no prohibition against such review. Cf. Cecile Indus., Inc. v Cheney, 995 F.2d 1052, 1055-56 (Fed. Cir. 1993) (in the absence of a statutory directive, this court is reluctant to inject "sweeping changes" into a well-defined adjudicative scheme).

II. New and Material Evidence

Spencer challenges the legal conclusion involved in the Court of Veterans Appeals' determination that the evidence submitted in the 1990 Board proceeding did not constitute new and material evidence providing a new factual basis upon which Spencer's claim could be reopened. Spencer argues that in determining that such evidence was merely cumulative of that already contained in

the record, the court misinterpreted the pre-and post-VJRA provisions governing the reopening of claims.

Under pre-VJRA law, the Board was authorized to reopen a finally disallowed claim upon the filing of new and material evidence "in the form of official reports" from the veteran's service department. 38 U.S.C. § 4004(b) (1982). Section 4004(b) was amended by the VJRA to "make a technical correction in the description of the [Board's] authority to reopen a claim by deleting (as inconsistent with present practice) the present requirement that new and material evidence sufficient to reopen a claim be in the form of an official report from the proper service department." Explanatory Statement on Compromise Agreement on Division A of S.11, 134 Cong. Rec. S16650, 16653 (daily ed. Oct. 18, 1988), reprinted in 1988

U.S.C.C.A.N. 5834, 5840. The statute, as amended, no longer prohibits the Board from accepting evidence from other sources as new and material. See 38 U.S.C. § 7104(b).

Spencer asserts that because none of the evidence submitted by him in the 1978, 1984, and 1987 Board proceedings (consisting primarily of medical opinions, lay statements, and testimony) was in the form of official reports, such evidence could not have been properly considered by the Board. Thus, he contends the evidence submitted in the 1990 proceeding (consisting of testimony of Spencer and his wife) was "new and material" within the meaning of section 5108 because it could not have been cumulative of the evidence lawfully contained in the record.

After a thorough and exhaustive analysis of the statutory and regulatory scheme governing the reopening of claims, the Court of Veterans Appeals concluded that pre-VJRA law was ambiguous as to whether the Board was prohibited from considering evidence not in the form of official reports, that the Board in fact had a practice of considering evidence from any source prior to the enactment of the VJRA, and that this practice was based on a permissible construction of the applicable pre-VJRA provisions. Accordingly, the court found that the evidence presented by Spencer in the 1990 proceeding was merely cumulative of that which was previously of record at the time of the prior Board decisions, and thus that it was not new and material.

We perceive no error in the legal analysis used by the Court of Veterans

Appeals in resolving this issue. In the absence of such error, we cannot disturb the court's holding that there was no new and material evidence presented after the Board's 1987 decision that would entitle Spencer to a reopening of his claim, as that would require us to review the application of law to the facts of this case, concerning which we have no jurisdiction. 38 U.S.C. § 7292(d)(2) (Supp. IV 1992).

Spencer finally contends that the Board in its prior decisions did not properly consider certain evidence presented in support of his claim, including Spencer's testimony, lay statements, and private medical opinions. That contention, however, raises only questions of fact; it does not challenge the validity of any statute or regulation or the interpretation of a constitutional

or statutory provision relied upon by the Court of Veterans Appeals in reaching its decision. Thus, we also have no jurisdiction to entertain that challenge. 38 U.S.C. § 7292(d).

## CONCLUSION

In affirming the decision of the Board, the Court of Veterans Appeals did not err in holding that Spencer was not entitled to de novo review of his finally disallowed claim for service-connected disability compensation for MS under the Veterans' Judicial Review Act of 1988. Additionally, the court did not err in determining that Spencer failed to present new and material evidence warranting reopening of his claim.

**AFFIRMED**

UNITED STATES COURT OF VETERANS APPEAL

No. 90-1360

DONALD G. SPENCER, Appellant,

v.

JESSE BROWN,

Secretary of Veterans Affairs, Appellee.

JUDGMENT

The decision of the Court having been issued in this case, and the time for reconsideration or review thereof pursuant to Rule 35 of the Court's Rules of Practice and Procedure, having expired,

Judgment in accordance with the Court's decision is hereby entered pursuant to Rule 36 this date.

DATED: March 17, 1993

FOR THE COURT:

ROBERT F. COMEAU
Clerk of the Court

UNITED STATES COURT OF VETERANS APPEALS

No. 90-1360

DONALD G. SPENCER, APPELLANT,

V.

JESSE BROWN,
SECRETARY OF VETERANS AFFAIRS, APPELLEE

On Appeal from the Board of Veterans' Appeals

and

On Appellee's Motion for Summary Affirmance

(Argued October 29, 1992
Decided March 1, 1993)

Michael P. Horan for appellant.

Adam K. Llewellyn, with whom James A. Endicott, Jr., General Counsel, David T. Landers, Acting Assistant General Counsel, Andrew J. Mullen Deputy Assistant General Counsel, and Angela Foehl were on the pleadings, for appellee.

Before NEBEKER, Chief Judge, and MANKIN and STEINBERG, Associate Judges.

STEINBERG, Associate Judge: The appellant, veteran Donald G. Spencer, appeals a July 23, 1990, decision of the Board of Veterans' Appeals (BVA or Board) denying service connection for multiple sclerosis (MS). Donald G. Spencer, BVA 90-25138 (July 23, 1990). The appellant asserts that, although he did not submit evidence that was "new and material", under the precedents of this Court, so as to reopen his previously and finally denied claim, the Board was required to review his claim de novo pursuant to 38 U.S.C.A. § 5110(g) (West 1991) and the Veterans' Judicial Review Act (VJRA), Pub. L. No. 100-687, 102 Stat. 4105 (1988), or alternatively, that his evidence must be considered new and material because the Board at the time of its prior decisions had been statutorily prohibited from considering similar evidence then

submitted. The Court will affirm the Board's decision.

## I. Background

The veteran had active service from March 1944 to February 1946. R. at 11. His induction physical was negative for defects. On his separation examination, it was reported that he had had a left-knee operation in 1938 and back strain in 1944. Ibid. In December 1946, the veteran filed with a Veterans' Administration (now Department of Veterans Affairs) (VA) regional office (RO) a claim for service connection for backache, submitting a private examination report stating that he had some limitation on forward bending and a "crackling sensation on extremes of flexion". Ibid. At an April 1947 VA examination, the veteran reported intermittent low back pain since

service with some limitation of motion. Ibid. The RO denied the claim in June 1947. Ibid.

In November 1976, the veteran filed a claim with the VARO for service connection for MS. He submitted a statement from a private physician, Dr. Edward J. Fredericks, who stated that he had treated the veteran since November 1975, and that the veteran had MS. Dr. Fredericks further stated:

> The history suggests the possibility that he had his first attack of multiple sclerosis in the spring of 1945, following a plane crash. He apparently had numbness and weakness of his legs for several weeks at that time, which I suspect was not a direct result of his injury. It is not possible to prove that this was his first episode of [MS], but it is certainly possible.

R. at 1. In a November 9, 1976, decision, the RO denied the claim. R. at 2.

In March 1977, the veteran submitted another letter from Dr. Fredericks, stating: "I have reviewed [the veteran's] neurologic history dating back to the spring of 1945 and have read a letter from one of his companions at that time. The history suggests the probability that he had his first attach of [MS] in the spring of 1945." R. at 7. He subsequently submitted statements, from other private physicians who had treated him for back and leg problems between 1966 and 1977, that the veteran's problems could have been indicative of MS (R. at 28-29, 34), and several lay statements that the veteran had had back problems in service (R. at 8-9, 38-39) and had had trouble walking and problems with his back and legs since service (R. at 25, 34).

On November 7, 1977, the veteran testified under oath at a hearing before

the RO that he had been in an airplane crash in the spring of 1945 (R. at 45); that he had experienced fatigue and numbness during service prior to the airplane crash (R. at 45); that he had had extreme back pain and trouble ambulating after the crash (R. at 45); that after the crash he had collapsed and been temporarily paralyzed during a basketball game (R. at 46); and that he had had back problems shortly after his discharge from service, when he was attending college (R. at 50). He testified that he had sought and received treatment in the early 1950s for back and leg problems, fatigue, and numbness (R. at 52, 59), that he had been found to have a high level of albumin in his urine during service (R. at 53-54) (which he contends is indicative of MS), and that he had served in the inactive

Navy Reserves after his discharge (R. at 64).

In a May 24, 1978, decision, the BVA denied service connection for MS and for a back disability. R. at 83. With regard to the MS claim, the Board stated that Dr. Fredericks' opinion was unsupported by the evidence of record, that his opinion was based primarily on history related by the veteran, that service medical records were negative for complaints of leg numbness or weakness, and that examinations in 1946 and 1947 had revealed no neurological abnormalities. On January 10, 1980, an expanded panel of the Board, in a reconsideration decision, also denied the claims. R. at 93.

In 1983, the veteran submitted additional evidence, including a lay statement from his brother-in-law stating that he had lived with the veteran from

1948 to 1952 and had lived in the same neighborhood until 1959, and that the veteran had then had problems with his legs, back, and eyes requiring him to visit several doctors. R. at 99. He submitted a lay statement from his former college roommate from the fall of 1946, stating that the veteran had then suffered from excessive fatigue and a left-foot dangle. R. at 100. In an October 1983 report of an examination, Dr. Robert L. Chesanow, a private neurologist, stated that he had examined all the medical and lay evidence relating to the veteran's claimed disability, conducted a neurological examination of the veteran, and concluded that the evidence established "that the patient's [MS] began during 1944-45 (age 20), with a high degree of medical probability", and that "[t]he facts can be interpreted in no

other way." R. at 101-05. At a November 1983 personal hearing before the RO, the veteran and Dr. Chesanow both testified under oath. R. at 106-18.

In an October 4, 1984, decision, the BVA denied the MS claim, stating that the lay statements and testimony submitted since the prior BVA decision in 1980 were all "essentially similar" to those previously considered. R. at 141. With regard to Dr. Chesanow's statement and testimony, the Board stated that it was "based to a considerable extent upon information supplied to him by the veteran more than 37 years subsequent to service discharge", and concluded that Dr. Chesanow's statement did not present an adequate evidentiary basis reasonably supporting a finding that MS was actually present in service or within the presumption period. R. at 142.

In 1986, the veteran sought to reopen his claim and informed the RO that he had served in the Army Reserves and Massachusetts National Guard from June 14, 1950, to August 25, 1958, and that he had served in the inactive Navy Reserves from 1946 until 1950. R. at 148. In a March 30, 1987, decision, the Board again denied the claim. R. at 154.

In May 1989, the veteran and his wife appeared at a personal hearing before the RO and testified under oath that the veteran had had problems with his back and legs since service, including numbness, tingling, fatigue, and trouble ambulating, and that he had, at times, had to use canes to ambulate. R. at 175-94.

In its July 23, 1990, decision here on appeal, the BVA again denied the claim. The Board noted: "No specific allegations of obvious error have been made with

respect to these determinations in the current appeal. The question for consideration is, therefore, whether the additional evidence presented creates a new factual basis warranting allowance of service connection." Spencer, BVA 90-25138, at 6. The Board concluded that "the additional evidence consisting of personal hearing testimony does not reasonably establish that the veteran's [MS] is the result of his active service." Ibid. The Board went on to state that the earlier medical opinions were based on the history provided by the veteran many years after service, that the history was not confirmed by contemporaneous clinical records, and that the plane crash in service was not mentioned in his service records. Id. at 6-7.

At oral argument on the present appeal, the Court requested the parties to

submit supplemental memoranda addressing, inter alia, the issue of whether the scope of the VA's authority to reopen a claim in the event of new and material evidence was changed by the VJRA and whether the VA's practice with regard to reopening claims upon new and material evidence had been in conformance with the statutory requirements prior to the VJRA. The parties filed those memoranda on November 12 and 19, 1992.

## II. Analysis

### A. Two-Part Test for Reopening Previously and Finally Denied Claims

Pursuant to 38 U.S.C.A. § 5108 (West 1991), the Secretary of Veterans Affairs (Secretary) is required to reopen a previously and finally denied claim when "new and material evidence" is presented or secured with respect to that claim. See also 38 U.S.C.A. § 7104(b) (West

1991). On claims to reopen previously and finally denied claims, the BVA must conduct a two-step analysis. See Manio v. Derwinski, 1 Vet.App. 140, 145 (1991). First it must determine whether the evidence presented or secured since the prior final disallowance of the claim is "new and material". If it is, the Board must then review the new evidence "in the context of" the old to determine whether the prior disposition of the claim should be altered. See Jones (McArthur) v. Derwinski, 1 Vet.App. 210, 215 (1991).

In this case, which was decided prior to this Court's decision in Manio, supra, the Board did not apply the two-step test for adjudicating claims to reopen previously and finally denied claims. Instead, it stated the issues as "whether the additional evidence presented creates a new factual basis warranting allowance

of service connection", and concluded that "the additional evidence consisting of personal hearing testimony does not reasonably establish that the veteran's multiple sclerosis is the result of his active service." Spencer, BVA 90-25138, at 6. Because the BVA did not apply the two-step Manio test, it is not clear from its decision whether the Board concluded that there was new and material evidence to reopen the veteran's claim for service connection of his MS.

The determination as to whether evidence is "new and material" is a conclusion of law which this Court reviews de novo under 38 U.S.C.A. § 7261(a)(1) (West 1991). See Masors v. Derwinski, 2 Vet.App. 181, 185 (1992); Jones, 1 Vet.App. at 213; Colvin v. Derwinski, 1 Vet.App. 171, 174 (1991). Evidence is new if it is not "merely cumulative" of

evidence already in the record. Colvin, supra. Evidence is "material" if it is "relevant [to] and probative of the issue at hand" and there is "a reasonable possibility that the new evidence, when viewed in the context of all the evidence, both new and old, would change the outcome." Colvin, supra. The only evidence received by VA after the 1987 final BVA decision was the 1990 sworn testimony of the veteran and his wife. That testimony is no more than a reiteration of testimony and lay statements that were before the Board at the time it rendered its prior decisions. R. at 8-9, 25, 34, 38-39, 41-67, 100, 106-18. Therefore, subject to the discussion in part C., below, the 1990 testimony is merely cumulative of evidence previously of record, and it cannot be considered "new and material" so as to justify

reopening the veteran's claim. (Indeed, the appellant's counsel so conceded at oral argument.) Subject to the same caveat, the claim should not have been reopened and any error attendant on the Board's failure to apply the proper standards in its adjudication of the claim is harmless. See 38 U.S.C.A. § 7261(b) (West 1991); Kehoskie v. Derwinski, 2 Vet.App. 31, 34 (1991); Godwin v. Derwinski, 1 Vet.App. 419, 425 (1991); Thompson v. Derwinski, 1 Vet.App. 251, 254 (1991).

Although the appellant conceded at oral argument that there was no "new and material evidence", as those terms have been construed by this Court in its prior decisions, to reopen his claim, he asserts that the Board was required to review his claim de novo, and presents two arguments in support of that assertion. First, the

appellant argues that, pursuant to 38 U.S.C.A. § 5110(g) and 38 C.F.R. § 3.114(a) (1992), VA is required to review previously and finally denied claims de novo when there has been an intervening liberalization of a law affecting entitlement to benefits, and that the VJRA is such a liberalizing law. Therefore, the appellant asserts, the VJRA enactment in 1988 requires VA, upon application from a claimant, to review de novo a previously and finally denied claim. Second, the appellant asserts that prior to the VJRA's enactment the Board was statutorily prohibited from considering as "new and material evidence" anything other than evidence from official service department reports, and that, pursuant to the VJRA provisions amending 38 U.S.C. § 4004(b) (now § 7104) and adding 38 U.S.C. § 3008 (now § 5108), the Board after November 18,

1988, could consider any form of evidence as "new and material evidence". Therefore, he asserts, the Board could not previously have considered, in its adjudications in 1984 and 1987, any of the testimony or lay and medical evidence submitted subsequent to the Board's initial final denial of the claim in 1978. Despite the appellant's concession at oral argument that he had not submitted new and material evidence for purposes of reopening his claim, the gravamen of this argument, asserted at oral argument and in the appellant's November 19, 1992, post-oral-argument memorandum, is that the appellant's 1990 testimony was new and material evidence because it could not be considered cumulative of evidence that the Board had not been permitted by law to consider in its prior decisions, and because it is also relevant and probative

and, when viewed in the context of all the evidence, creates a reasonable possibility of changing the outcome.

### B. De Novo Review Under the VJRA as a "Liberalizing" Law

Section 7104(b) of title 38, U.S. Code, provides: "Except as provided in section 5108 of this title, when a claim is disallowed by the Board, the claim may not thereafter be reopened and allowed and a claim based upon the same factual basis may not be considered." 38 U.S.C.A. § 7104(b) (West 1991). As noted in part II.A., above, section 5108 requires the Secretary to reopen previously and finally disallowed claims when new and material evidence is presented or secured with respect to such claims.

Section 5110(g) of title 38, U.S. Code, pertaining to effective dates of VA benefits awards, provides in part:

> Subject to the provisions of Section 5101 of this title, where compensation, dependency and indemnity compensation, or pension is awarded or increased pursuant to any Act or administrative issue, the effective date of such award or increase shall be fixed in accordance with the facts found but shall not be earlier than the effective date of the Act or administrative issue.

38 U.S.C.A. § 5110(g) (West 1991). Similarly, 38 C.F.R. § 3.114(a) (1992), promulgated pursuant to section 5110(g), provides in part:

> Where pension, compensation, or dependency and indemnity compensation is awarded or increased pursuant to a liberalizing law, or a liberalizing VA issue approved by the Secretary or by the Secretary's direction, the effective date of such award shall be fixed in accordance with the facts found, but shall not be earlier than the effective date of the act or administrative issue.

The appellant contends that these statutory and regulatory provisions

require VA to conduct de novo review of a previously and finally denied claim, regardless of whether new and material evidence has been presented or secured, when there has been an intervening liberalizing law or VA issue which may affect the disposition of the claim. He further contends that the VJRA is such a liberalizing law, thus requiring VA to adjudicate his claim de novo.

Section 5110 (g) does not on its face or by clear implication create a requirement that VA adjudicate de novo a previously and finally denied claim when there has been an intervening liberalizing law that may affect the claimant's entitlement to benefits. Rather, that section merely provides the means for determining the effective date of any award of VA benefits made pursuant to a liberalizing law or administrative issue.

However, although section 5110(g) does not explicitly create the right to a de novo adjudication, it appears to be contingent upon, and thus to presuppose, the existence of such a right.

The entitlement to de novo review of a previously and finally denied claim based upon an intervening change in law or regulation creating a new entitlement derives from the new law or regulation itself. When a provision of law or regulation creates a new basis of entitlement to benefits, as through liberalization of the requirements for entitlement to a benefit, an applicant's claim of entitlement under such law or regulation is a claim separate and distinct from a claim previously and finally denied prior to the liberalizing law or regulation. The applicant's latter claim, asserting rights which did not

exist at the time of the prior claim, is necessarily a different claim. See, e.g., Sawyer v. Derwinski, 1 Vet.App. 130, 133 (1991). Section 7104(b) provides that "when a claim is disallowed by the Board, the claim may not thereafter be reopened and allowed and a claim based upon the same factual basis may not be considered." Where a claim is based upon a substantive right created by a statutory or regulatory provision that did not exist at the time of the prior final denial of the claim, adjudication of the latter claim is not a "reopening" of the first, such as would be prohibited, absent new and material evidence by section 7104(b). And the fact of the intervening change in law is itself sufficient to change the factual basis such that the latter claim is not "a claim based upon the same factual basis" as the former claim. Cf. Akins v. Derwinski, 1

Vet.App. 228, 230 91991) (holding that a presumption created by statute was itself new and material evidence).

Moreover, there is no indication that Congress or VA has intended to preclude, by operation of the finality provisions of section 7104(b), a claimant's entitlement to benefits under an intervening law providing a new basis for entitlement to benefits. That is particularly so in light of the nature of the VA benefits adjudication process, which operates with "a high degree of informality and solicitude for the claimant" (Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 311 (1985)) and VA's policy, stated in its regulations, "to assist a claimant in developing the facts pertinent to the claim and to render a decision which grants every benefit that can be supported in law while protecting the

interests of the Government." 38 C.F.R. § 3.103(a) (1992); see also 38 C.F.R. § 3.159 (1992).

The finality provisions of section 7104(b) are closely analogous to the doctrine of res judicata that generally bars readjudication of claims which have been previously decided. The Supreme Court has stated that it is a "general rule that res judicata is no defense where between the time of the first judgment and the second there has been an intervening change in the law creating an altered situation." State Farm Mutual Auto Ins. Co. v. Duel, 324 U.S. 154, 162 91945); see also Texaco, Inc. v. United States, 579 F.2d 614 (Ct. Cl. (1978). Although the prohibition on reopening in section 7104(b), unlike the doctrine of res judicata, is a statutory requirement, essentially the same concerns apply to

determine whether the latter claim is the same claim as the former. The Court concludes, therefore, that section 7104(b) does not preclude de novo adjudication of a claim, on essentially the same facts as a previously and finally denied claim, where an intervening change in law or regulation has created a new basis of entitlement to a benefit.

Our conclusion that section 5110(g) presupposes the right to a de novo adjudication but only where an intervening change in law or regulation has created a new basis of entitlement for a particular claimant further derives from the specific language of section 5110(g). That provision establishes a retroactive effective date for an award or increase "where compensation, dependency and indemnity compensation, or pension is awarded or increased pursuant to any Act

or administrative issue". 38 U.S.C.A. § 5110(g) (West 1991) (emphasis added). The use of the words "pursuant to" clearly indicates that the benefits of this provision adhere only where the "Act or administrative issue" is one which provides a substantive basis for establishing entitlement to benefits.

In the present case, however, the appellant has not pointed to any such change in law or regulation which would require de novo adjudication, absent new and material evidence of his claim for service connection for MS. Rather, the appellant asserts that the VJRA generally is such a liberalizing law because it effected "profound, far reaching, and fundamental changes in the VA's claims adjudication system." Br. at 7. Specifically, he states that the VJRA, inter alia, provided for judicial review

of BVA decisions by this Court; required VA to comply with the rulemaking procedures of the Administrative Procedure Act (5 U.S.C. § 553); codified standards pertaining to the burden of proof, the duty to assist, and the benefit of the doubt in VA claims processing and adjudication; required that claimants be given an opportunity to appear at a personal hearing; required the BVA to base its decisions on all the evidence of record and to provide a written statement of its findings and conclusions and the reasons or bases for those findings or conclusions; and liberalized the standards governing the types of evidence that could qualify as new and material evidence to reopen a previously and finally denied claim. The appellant asserts that these changes require VA, upon application, to adjudicate de novo any claim that had been

previously and finally denied prior to the VJRA's enactment.

Although there is no doubt that the above-described VJRA provisions did fundamentally change the nature of VA claims adjudication proceedings, that fact alone does not provide a basis for de novo readjudication of previously and finally denied claims where neither the facts of the claim nor the provisions of law and regulation governing the claimant's entitlement to benefits have changed since the prior final adjudication. Notwithstanding the VJRA, a claim based upon the same facts and the same claim of legal entitlement cannot be considered a new claim so as to avoid the section 7104(b) statutory prohibitions on reopening previously and finally denied claims and considering claims based upon the same factual basis as were such

finally denied claims. Rather, the type of change in law or regulation which will justify a de novo adjudication of a claim after a final decision is a change which provides a new basis for establishing entitlement to the relief sought so as to render the new claim legally and factually distinct from the former claim. Cf. Sawyer, supra.

In the present case, the appellant's prior claim, which was denied by the BVA in 1978, 1980, 1984, and 1987, was based upon an assertion of service connection for MS, entitlement to which is governed by 38 U.S.C.A. §§ 1110, 1112(a)(4) (West 1991) and 38 C.F.R. §§ 3.303, 3.307, 3.309(a) (1992). Nothing in the VJRA changed the requirements for establishing entitlement to service connection for MS under those provisions. Hence, the Court concludes that the enactment of the VJRA

did not provide a new basis for establishing entitlement to benefits which would justify adjudicating de novo, as a new claim, the appellant's claim for service connection of his MS.

### C. Change in the New and Material Evidence Requirements

**i. Summary of the issue.** In his brief and oral argument on the issue discussed in part B., above, regarding de novo adjudication under the VJRA as a "liberalizing" law, and in his post-argument memorandum, the appellant has raised a distinct issue with respect to the VJRA which merits separate consideration of the question whether he had submitted new and material evidence so as to entitle him to reopening of his claim.

Prior to the VJRA's enactment on November 18, 1988, 38 U.S.C. § 4004(b) provided:

> When a claim is disallowed by the Board, it may not thereafter be reopened and allowed, and no claim based upon the same factual basis shall be considered; however, where subsequent to disallowance of a claim new and material evidence in the form of official reports from the proper service department is secured, the Board may authorize the reopening of the claim and review of the former decision.

38 U.S.C. § 4004(b) (1982) (emphasis added). Section 204 of the VJRA amended this provision to state:

> Except as provided in section 5108 of this title, when a claim is disallowed by the Board, the claim may not thereafter be reopened and allowed and a claim based upon the same factual basis may not be considered.

38 U.S.C.A. § 7104(b) (West 1991). Section 5108, which was added by VJRA section 103(a)(1), provides: "If new and

material evidence is presented or secured with respect to a claim which has been disallowed, the Secretary shall reopen the claim and review the former disposition of the claim." VJRA Pub.L. No. 100-687, § 103(a)(1), 102 Stat. 4105, 4107 (1988).

The appellant asserts that the pre-VJRA version of section 4004(b) prohibited the BVA from considering anything other than official service department reports as new and material evidence to reopen a claim previously and finally denied by the Board. Therefore, he asserts, when, subsequent to the Board's final denial of his claim in 1978, he submitted additional evidence consisting entirely of other than official service department reports - sworn testimony, law statements, and medical reports - the Board was prohibited by statute from considering that evidence to determine whether it was new and

material. He thus asserts that his 1990 testimony could not be cumulative of that other evidence submitted in 1983 because it could not lawfully have been considered by the Board prior the VJRA's enactment, and that, therefore, his 1990 testimony must be considered new evidence for purposes of determining whether he submitted new and material evidence sufficient to justify reopening his claim.

At oral argument, the Secretary asserted that, notwithstanding the pre-VJRA provisions of section 4004(b), the VA's practice has always been to accept evidence from any source as new and material evidence, and that the veteran's 1990 testimony was thus cumulative of his prior testimony, which, he asserts, was in fact included in the record before the Board when it rendered its prior decisions (the Board in 1984 made express reference

to the 1983 testimony of the veteran and Dr. Chesanow, R. at 139-40). However, the Secretary was unable to cite any statutory or regulatory authority for that asserted VA practice. In his response at oral argument, and in his memorandum filed subsequent to oral argument, the appellant asserted that, even if it was then the VA's practice to consider any evidence, regardless of its source, as new and material (and he did not concede that it was), the VA was without statutory authority to do so, and thus its unauthorized practice could not be upheld as a basis for finding his 1990 testimony to be cumulative of other evidence.

The Court notes that, prior and subsequent to the enactment of the VJRA, 38 U.S.C. § 4005(c) (now § 7105) provided (and continues to provide) that a claim that had been finally denied by an

unappealed RO decision could not thereafter be reopened or allowed "except as may otherwise be provided by regulations not inconsistent with this title". It is thus clear that the Secretary is authorized to establish regulations consistent with title 38 requiring the RO and BVA to reopen, on the basis of other than new and material evidence from service department reports, a claim that had been previously and finally denied by the RO but not by the BVA. The appellant has not asserted that section 4004(b) or any other provision of law or regulation ever prohibited such reopening, when authorized by regulation, after final RO denial. Rather, the appellant's argument and this Court's analysis regarding reopening under section 4004(b) on the basis of new and material evidence relate only to those cases where

the claim has been denied by a prior final BVA decision.

**ii. VA's pre-VJRA practice:** The Court notes, initially, that there is significant support for the Secretary's assertion that the VA's practice has long been to consider evidence from any source, not just from service department reports, as capable of being new and material. Prior to the November 1988 enactment of the VJRA, VA regulations contained (and still contain) a provision establishing the effective date for claims reopened upon new and material evidence "[o]ther than service department records [referred to as "reports" in the statute]" received after final disallowance of the claim. 38 C.F.R. § 3.400(q)(1) (1983) (emphasis in original). Additionally, statements in the legislative histories of bills enacted prior to the VJRA affirm that it was the

VA's practice to reopen claims upon receipt of new and material evidence from any source. See S. Rep. No. 418, 100th Cong., 2d Sess. 34 (1988) ("Current Board practice is to authorize such reopening when 'new and material evidence' is received from any source"); EXPLANATORY STATEMENT ON COMPROMISE AGREEMENT ON DIVISION A OF S. 11, 134 Cong. Rec. S16650, 16653 (1988), reprinted in 1988 U.S.C.C.A.N. 5782, 5840 (VJRA provision would "make a technical correction in the description of the BVA's authority to reopen a claim by deleting (as inconsistent with present practice) the present requirement that new and material evidence sufficient to reopen a claim be in the form of an official report from the proper service department").

This more flexible practice is not inconsistent with the text of a VA

regulation concerning "finality" that then provided:

> When a claimant requests that a claim be reopened after an appellate decision and submits evidence in support thereof, a determination as to whether such evidence is new and material must be made and, if it is, whether it provides a new factual basis for allowing the claim. An adverse determination as to either question is appealable.

38 C.F.R. § 19.194 (1983) (emphasis added). This regulation gives as its authority "38 U.S.C. 4004(b)", so quite clearly it should not be read as extending beyond its statutory source in permitting reopenings of prior final Board decisions. It is, therefore, difficult to draw much guidance from this language as to whether prior to the VJRA a final Board decision could be reopened by the Board or an RO on other than service-department-report new and material evidence.

It is not clear from the BVA's 1984 and 1987 decisions in this case whether the Board concluded that the evidence then submitted, which included lay and medical evidence, was new and material. However, it is clear that in neither of those decisions did the Board reject the evidence proffered as new and material evidence on the grounds that it could not qualify as new and material evidence because it did not consist of service department reports.

The question, then, is whether the VA's practice of allowing evidence from any source to constitute new and material evidence to reopen a claim previously and finally denied by the BVA was, prior to VJRA enactment, and at the time of the prior BVA decisions in this case, in conflict with the statutory requirements then in 38 U.S.C. § 4004(b). The Supreme

Court has described the proper inquiry for determining whether an agency's practice is consistent with a statute that the agency is charged with implementing, as follows:

> We first ask "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." (Citations omitted.) "In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." (Citations omitted.) But "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute," (citations omitted) that is, whether the agency's construction is "rational and consistent with the statute," (citations omitted).

Sullivan v. Everheart, 494 U.S. 83, 88-89 (1990). For the reasons stated below, the

Court holds that the law prior to the VJRA was at best ambiguous as to whether section 4004(b) prohibited the RO and BVA from adjudicating a claim that was based on essentially the same factual basis as a claim that had been previously and finally disallowed by the Board, when the new claim was supported by new and material evidence other than service department reports. The Court further holds that the VA's pre-VJRA practice of allowing such claims to be adjudicated when new and material evidence was received from any source was based on a permissible construction of the governing statutory provisions (which, as explained below, have been located in several different statutory sections over the years).

Part of the ambiguity in the pre-VJRA law may derive from the very term "reopening". Current section 5108,

enacted by the VJRA, requires the Secretary to "reopen" a claim and to "review the former disposition of the claim" when new and material evidence is presented or secured. However, the "reopening" of the claim pursuant to section 5108 is not a reactivation of the previous claim, based upon the original application for benefits. Rather, even upon a reopening, the prior claim is still "final" in a sense. Any award of benefits made upon a claim reopened under section 5108 on other than service department reports will have an effective date no earlier than the date of the filing of the claim to reopen - that is, the date of the new application for benefits. See 38 U.S.C.A. § 5110(a) (West 1991); 38 C.F.R. § 3.400(q)(1)(ii) (1992). On the other hand, VA regulations have long provided (and still do) that when a claim is

reopened on the basis of new and material evidence from service department reports, the effective date of any award shall "agree with evaluation (since it is considered these records were lost or mislaid) or date of receipt of claim on which prior evaluation was made, whichever is later, subject to rules on original claims filed within one year of service." 38 C.F.R. § 3.400(q)(2) (1978) (emphasis added).

Furthermore, although section 5108 instructs the Secretary to "review the former disposition of the claim", neither the Secretary nor the Board may modify or amend that former disposition except as provided in other statutory and regulatory provisions allowing revision of former decisions on the basis of "clear and unmistakable error" (38 C.F.R. § 3.105(a)) or "obvious error" (38 U.S.C.A. § 7103(c)

(West 1991)). Thus, a claim which is "reopened" under section 5108 on the basis of "new and material evidence" from other than service department reports is essentially a new claim, rather than a continuation of the prior claim, and the function of "reopening" under section 5108 is to remove the statutory finality bar of section 7104(b), which, as stated above, operates as a type of res judicata prohibition on readjudication of claims. In contrast, where the claim is reopened on the basis of new and material evidence from service department reports, the VA has consistently treated it as a true "reopening" of the original claim and a review of the former disposition in light of the service department reports which were considered to have been lost or mislaid, and the award of benefits is made retroactive to the date of the original

claim. See 38 C.F.R. § 3.400(q)(2) (1991); VA G.C. Digested Opinion, July 17, 1984 (stating that section 3.400(q)(2) reflects "a longstanding VA policy treating supplemental service department reports correcting prior erroneous reports as providing a basis for an award of benefits based on the veteran's original claim" (emphasis added) and citing to opinions of the VA Solicitor from 1935 to 1937).

Although there appears to be scant, if any, discernible support in the current statute for VA's different treatment of claims "reopened" on the basis of new and material service-department-report evidence and claims "reopened" on the basis of new and material evidence from other sources, a brief historical overview of the applicable statutory scheme sheds some light upon the disparity.

**III. Analysis of prior law:** Prior to the 1958 overall codification of title 38 of the U.S. Code, the laws and rules governing veterans benefits were contained in various public laws and in executive orders promulgated by the President pursuant to his authority under Pub. L. No. 73-2 (1933). A "Veterans' Regulation" promulgated by such executive order contained provisions which formed the basis for current section 7104 of title 38, U.S. Code. That regulation provided in part:

> II. All questions on claims involving benefits under the laws administered by the [VA] shall be subject to one review on appeal to the Administrator of Veterans' Affairs, decisions in such cases to be made by the [BVA] in accordance with the provisions of paragraph I. When a claim shall be disallowed by the [BVA], it may not thereafter be reopened and allowed and no claim based upon the same factual basis shall be

> considered, except that where subsequent to such disallowance new and material evidence in the form of official reports from the proper Service Department is secured, the [BVA] may authorize the reopening of the claim and review of the former decision.

Vet. Reg. No. 2(A), Part II, para. II, Ex. Ord. No. 6230 (July 28, 1933) (emphasis added). Another provision in Part I of that same regulation provided:

> Where a claim has been finally disallowed, a subsequent claim on the same factual basis, if supported by new and material evidence, shall have the attributes of a *new* claim, notwithstanding the provisions of paragraph II, Part II of Veterans' Regulation No. 2-Series.

Vet. Reg. No. 2(A), Part I, para. I(a)(3), Ex. Ord. No. 6230 (July 28, 1933) (emphasis added). The provision in paragraph I(a)(3) of Part I of this regulation clearly provides that, subsequent to final disallowance of a claim, a *new* claim may be filed on

essentially the "same factual basis" provided that there is, additionally, new and material evidence. Moreover, the phrase "notwithstanding the provisions of paragraph II of Part II" strongly implies that the "new and material evidence" to support the new claim is not restricted to reports from the service department. Since paragraph II of Part II already provided authority for a "reopening" when there is new and material evidence from service department reports, the "notwithstanding" clause would have no meaning unless paragraph I(a)(3) is read to provide a basis for abjudicating claims based on new and material evidence from other sources. In view of the above discussion, it is apparent that the provision allowing the Board to "reopen" on the basis of new and material evidence in the form of service department reports

did not thereby define the term "new and material evidence" for all purposes to refer to such evidence only.

Furthermore, it is significant that this 1933 regulation did not use the term "reopen" in relation to a claim based on new and material evidence from other than service department reports, whereas it did use "reopen" with respect to claims where the new and material evidence was in the form of service department reports. That distinction can certainly be read as supporting VA's practice of treating claims based on new and material service department reports as "reopened" in that they relate back to the original claim, while treating claims based on new and material evidence from other sources as essentially new claims.

This point is significant. If a "reopening" refers only to revisiting, on

the basis of the original claim, a claim finally decided by the BVA, and not to claims submitted as "subsequent" or "new" claims on the basis of new and material evidence after final BVA adjudication, then the prohibition in paragraph II of Part II (and subsequently in §§ 4004(b) and 7104(b)) on "reopening" except on the basis of new and material evidence from service department reports would not have precluded the VA from adjudicating, as a new claim, a subsequent claim based on new and material evidence from other than service department reports. The remaining prohibition in paragraph II of Part II (and subsequently in §§ 4004(b) and 7104(b)) -- that a claim "based upon the same factual basis" may not be considered -- would not operate as a bar to the allowance of such *new* claims because the

submission of new and material evidence necessarily changes the factual basis.

In 1957, Congress repealed Veterans' Regulation 2(A) and replaced it with provisions of Pub. L. No. 85-56, 71 Stat. 119 (1957). Section 1304 of that law, which was codified at 38 U.S.C. § 3304 (see 38 U.S.C., 1952 ed., Supp. V, § 3304), provided in part:

> (b) When a claim is disallowed by the Board, it may not thereafter be reopened and allowed, and no claim based upon the same factual basis shall be considered; however, where subsequent to disallowance of a claim, new and material evidence in the form of official reports from the proper service department is secured, the Board may authorize the reopening of the claim and review of the former decision.

(Emphasis added). Section 904 of Public Law 85-86, which was codified at 38 U.S.C. § 2904 (see 38 U.S.C., 1952 ed., Supp. V. § 2904), provided in part:

> (a) Where a claim has been finally disallowed, a later claim on the same factual basis, if supported by new and material evidence, shall have the attributes of a new claim, except that whenever any disallowed claim is reopened and thereafter allowed on the basis of new and material evidence resulting from the correction of the military records of the proper service department under section 1552 of title 10 of the United States Code, the effective date of commencement of the benefits so awarded shall be the date on which an application was filed for correction of the military record.

In 1958, as part of the overall title 38 codification, 38 U.S.C. §§ 2904 and 3304 were replaced by the virtually identical provisions in 38 U.S.C. §§ 3004 and 4004(b), respectively. Pub. L. No. 85-857, 72 Stat. 1225, 1241, §§ 3004, 4004(b) (1958). The exception in section 3004 was later replaced by section 3010(i) (now § 5110) in 1962. Pub. L. No. 87-825, § 1, 76 Stat. 948 (1962).

As with the predecessor Veterans' Regulations, these provisions speak of "reopening" only when the new and material evidence comes from official service department reports. Moreover, they are again consistent with the VA's interpretation giving retroactive effect to such "reopened" claims based on new and material evidence in service department reports (subject to the limitation that where such new and material evidence arises from correction of service department records, retroactivity is limited to the date of application for such correction), while treating claims based on new and material evidence from other sources as essentially new claims.

Section 3004 was repealed by Congress in 1962. Pub. L. No. 87-825, § 5(a), 76 Stat. 950 (1962). Simultaneously, Congress amended 38 U.S.C. § 3010 (now §

5110), concerning "Effective dates of awards", to provide in subsection (a) of that section:

> (a) Unless specifically provided otherwise in this chapter, the effective date of an award based on an original claim, a claim reopened after final adjudication, or a claim for increase, of compensation, dependency and indemnity compensation, or pension, shall be fixed in accordance with the facts found, but shall not be earlier than the date of receipt of application therefor.

Pub. L. No. 87-825, § 1, 76 Stat. 948 (1962) (emphasis added). Pursuant to the same Act, it was "provided otherwise" in 38 U.S.C. § 3010(i) (now § 5110) that where a claim is reopened on the basis of new and material evidence resulting from the correction of service department records, the effective date would be the date on which application was filed for such correction of records. Pub. L. No. 87-825, § 1, 76 Stat. 948 (1962)

(currently codified at 38 U.S.C.A. § 5110(i) (West 1991)).

Subsequent to the 1962 revisions, section 3010(a) appears to have erased any distinction between finally denied claims "reopened" on the basis of service department reports and claims filed as new claims on the basis of other forms of new and material evidence. Instead, section 3010(a) applied the term "reopened" to any claim based on new and material evidence submitted after a final adjudication. That post-1962 section might also appear to have precluded VA's practice of awarding benefits retroactive to the date of an original claim on the basis of new and material evidence in the form of official service department reports. The legislative history accompanying Public Law 87-825 stated that the purpose of the repeal of section 3004 and the amendment

to section 3010(a) was to extend the rule regarding the effective date of awards based on original claims in section 3010(a) to apply also to "reopened claims...now covered by section 3004". S. Rep. No. 2042, 87th Cong., 2d Sess. 1962), reprinted in 1962 U.S.C.C.A.N. 3260, 3263. Further confusing matters, it was stated that "[g]enerally the changes may be described as liberalizing." Id. at 3260.

**iv. Scope of the 1962 amendments:** As noted above, the changes made by Public Law 87-825 are susceptible of the interpretation that they, in effect, removed the VA's authority to adjudicate a previously denied claim when the claimant had submitted new and material evidence other than service department reports. However, that result would be reached only indirectly. By repealing section 3004 and by apparently characterizing all claims

based on new and material evidence as "reopened" claims, the 1962 amendments blurred the distinction which was formerly apparent between the provisions of section 4004(b) allowing reopening and review of the former BVA-denied claim only on the basis of new and material evidence in service department reports and the provisions of section 3004 providing that claims based on new and material evidence shall be treated as new claims, without limiting such new and material evidence to service department reports. Consequently, when a claim had been finally disallowed by the Board, any subsequent request for adjudication of that same claim supported by new and material evidence would appear to have been subject to the limitation, in section 4004(b), that a claim may not be "reopened and allowed" except that the Board may reopen on the basis of new and

material evidence in service department reports.

However, the Court cannot find any basis for ascribing to the 1962 "liberalizing" legislation any intent to work such a substantial change in the law by limiting the class of competent new and material evidence needed to support a claim after a final disallowance to include only such evidence from service department reports. Although, as noted above, such a result could be said to follow from the 1962 amendments, that result would be reached only indirectly, through the operation of section 4004(b) in view of the repeal of section 3004 and the amendment of section 3010(g), and that result is clearly beyond the intended scope of the 1962 amendments. The express legislative purpose of the 1962 amendments was to provide for uniformity in effective

dates of claims; and, as noted, the amendments were characterized generally as "liberalizing" amendments.

Clearly, the foreclosure of a substantial number of claims by prohibiting a reasserted claim subsequent to a final disallowance except upon new and material evidence in service department reports would have been a significant restriction on the rights of VA claimants, and an intent to impose such a restriction should not be ascribed to the 1962 legislation absent explicit support in the language or history of those amendments. The Supreme Court has stated:

> As a general rule where the legislation dealing with a particular subject consists of a system of related general provisions indicative of a settled policy, new enactments of a fragmentary nature on that subject are to be taken as intended to fit into the

> existing system and to be carried into effect conformably to it, excepting as a different purpose is clearly shown.

United States v. Jefferson Electric Co., 291 U.S. 386, 396 (1934); see also Hynes v. Grimes Packing Co., 337 U.S. 86, 116 (1949); United States v. Arizona, 295 U.S. 174, 191 (1935). The system of interrelated statutory provisions governing veterans benefits is a complex one, and an intent to depart from established law or practice will not be generally or lightly inferred when Congress enacts an amendment of limited scope.

The legislative history of Public Law 87-825 is devoid of any congressional intent to limit the circumstances in which claimants may file a new claim, supported by new and material evidence, after final disallowance of that claim. To the

contrary, the legislative history expressed only a limited, "liberalizing" purpose. Indeed, one Senator stated during Senate consideration:

> No hearings were held on this bill either in the House or in the Senate. It is impossible therefore to determine whether or not it is in the public interest. I think it is poor procedure and that therefore this bill probably needs more thorough scrutiny.

1962 U.S.C.C.A.N. 3269 (statement of Sen. Douglas). This statement suggests that Congress did not intend that Public Law 87-825 operate to limit a VA claimant's right to file a claim based on new and material evidence from any source subsequent to a final disallowance, and did not consider that such might be the incidental result of the legislation. In view of the foregoing, Public Law 87-825 cannot fairly be read as changing the prior law so as to preclude a VA claimant

from reasserting a claim, subsequent to a final disallowance, when the claimant presents new and material evidence from sources other than the service department. To the contrary, the provisions of section 3010(a) added by that Act, which establish effective dates for, inter alia, "a claim reopened after final adjudication", clearly were intended to continue the provisions previously in Veterans' Regulation 2(A) and 38 U.S.C. § 3004 allowing a claim subsequent to a final disallowance when new and material evidence is presented from any source. The Court, therefore, concludes that the VA's practice of allowing the reopening of claims in such circumstances was not prohibited by section 4004(b) (now § 7104(b)) or otherwise.

The enactment of the VJRA in 1988 expressly provided that the Secretary was

required to adjudicate a claim where, after final denial of that claim, new and material evidence was presented or secured. That requirement, now in section 5108, does not limit new and material evidence to service department reports only. Section 5108, as noted above, requires the Secretary, in such cases, to "reopen the claim and review the former disposition of the claim", although it is made clear elsewhere in the Code (in § 3010(a), now § 5110(a)) that such "reopening" will not have retroactive effect relating back to the original claim but will have the attributes of a new claim with regard to effective date. Although, as noted in subpart iii, above, the use of "reopening" in prior statutory provisions may have connoted only adjudication of a finally denied claim on the basis of the original application,

with any award being retroactive to the date of that application, the use of that term in § 3010(a) (now § 5110(s)) since 1962 and in § 5108 pursuant to the VJRA makes clear that "reopening" now refers as well to claims based on new and material evidence from sources other than service department reports; in essence, such claims are treated as new claims.

**v. Conclusion:** Based on the foregoing analysis, the Court holds that the law prior to the VJRA was, at best, ambiguous as to whether the provision in section 4004(b) prohibiting "reopening" by the Board except upon new and material evidence from service department reports was intended to preclude adjudication by an RO or the BVA of a previously and finally denied claim when the only new and material evidence was from other than those reports. In the face of such

ambiguity, the Court will defer to the agency's past interpretation allowing adjudication of such claims when new and material evidence is received from any source, because such interpretation is rational and is based on a permissible construction of the governing pre-VJRA provisions of law -- specifically Vet. Reg. No. 2(A), Part II, para. II (1933); 38 U.S.C. § 2904 (1957); 38 U.S.C. § 3004 (1958); and 38 U.S.C. § 3010(a) (1962). See Sullivan v. Everheart, 494 U.S. at 88-89.

Hence, we reject the appellant's contention that the VA was prohibited, prior to the enactment of the VJRA, from adjudicating a previously and finally denied claim when new and material evidence from sources other than service department reports was presented or secured. In the present case, it does not

appear from the record that the RO or BVA ever refused to consider in its prior decisions the veteran's testimony or lay or medical evidence on the ground that such evidence could not qualify as new and material evidence to justify a reopening. See R. at 136-42, 155-56. The Court thus confirms the holding in part II.A, above, that the veteran's 1990 testimony was cumulative of evidence previously of record at the time of the prior final BVA decisions and provides no basis upon which the veteran's claim could have been reopened. Accordingly, the Court also rejects the appellant's contention that there was new and material evidence to reopen his claim for service connection for his MS because the evidence newly submitted could not be cumulative.

## III. CONCLUSION

Based upon the foregoing analysis, the Court holds that there was no new and material evidence presented to or secured by the VA since the BVA's prior final disallowance of the appellant's claim in 1987, that there was no basis for adjudicating his claim de novo under 38 U.S.C. § 5110(g) and 38 C.F.R. § 3.114, and that any error in the Board's analysis in its July 23, 1990, adjudication of the merits of the appellant's claim was, therefore, harmless. See 38 U.S.C.A. § 7261(b); Kehoskie, 2 Vet.App. at 34; Godwin, 1 Vet.App. at 425; Thompson, 1 Vet.App. at 254. The July 23, 1990, BVA decision is thus affirmed.

AFFIRMED.

IN THE APPEAL OF

DONALD G. SPENCER C 9 336 219

**BOARD OF VETERANS APPEALS**

WASHINGTON, D.C. 20420

DOCKET NO. 89-27 205 )
DATE: JULY 23, 1990 )
)
)
)

THE ISSUE

Entitlement to service connection for multiple sclerosis.

REPRESENTATION

Appellant represented by: Paralyzed Veterans of America, Inc.

WITNESSES AT HEARING ON APPEAL

Appellant and spouse

CONSULTATIONS BY THE BOARD

Mark J. Swiatek, Staff Legal Advisor

ITEMS RELATING TO PRESENT
APPELLATE STATUS

In May 1978, the Board of Veterans Appeals denied entitlement to service connection for multiple sclerosis. The Board found that multiple sclerosis was not present in service; that the separation examination revealed no neurologic abnormalities; and that multiple sclerosis was first shown to exist more than seven years after discharge from active service. This determination was affirmed by the Board on reconsideration in January 1980. The Board, in October 1984 and March 1987 decisions, found that the additional evidence presented did not show that multiple sclerosis was present in service or within the first seven years after separation from service. A reopened claim was received in 1987.

## CONTENTIONS

It is asserted by and on behalf of the veteran, in essence, that the first manifestations of multiple sclerosis appeared during active service. and that after service he received treatment for such symptoms with the disorder finally diagnosed many years later. The veteran has also contended that statements made by service comrades and private physicians have not been given sufficient consideration. The veteran has asserted that reasonable doubt should be in his favor.

## THE EVIDENCE

The veteran had active service from March 1944 to February 1946.

The evidence before the Board of Veterans Appeals in the decisions of May 1978, October 1984 and March 1987 included the service medical records which were negative for any complaints or findings indicative of multiple sclerosis. On the report of the separation examination, back strain in 1944 was reported. The neurological evaluation was negative.

In his initial application for compensation in December 1946, the veteran reported a backache in July 1945 and other treatment in that year.

On the April 1947 Veterans Administration (now Department of Veterans Affairs, hereinafter referred to as VA) examination, there were no complaints or findings indicative of multiple sclerosis. The veteran's principle

complaints were referable to the back. Recurrent low back pain, postural-type, was diagnosed.

The record of private treatment included statements from Malcolm W. Bick, M.D., and Richey L. Waugh, Jr., M.D., who reported that the veteran was seen in March 1956 and that at that time he reported an infection of the retina on one eye five years previously that was related to a bad tooth. Astigmatism was reported. The November 1958, re-examination was essentially unchanged. In February, 1978, Dr. Bick noted that in 1977, someone had stated that the veteran had evidence of old optic neuritis in the right eye. It was also reported that this could have been the difficulty associated with the infected tooth in

1956. There was no record of eye treatment prior to 1956.

In December 1975, Edward J. Fredericks, M.D., reported that the veteran was seen in November 1975 on referral for an evaluation of a two-year history of extreme weakness and fatigue. He reported involvement in a plane crash in 1945, after which he had had numbness and weakness of the legs for several weeks. He also reported that he had been struck in the back while playing college football in 1946 and that he had low back and left leg pain thereafter that required two canes for ambulation for several weeks. He did well until approximately two years ago when he became aware of fatigue while playing golf. He had noticed an insidiously progressive weakness of the left

quadriceps muscle, recent "spastic movements" of the left leg, and numbness of the left hand as well as recent episodes of urinary incontinence. A May 1974 electromyogram of the left upper and lower extremities was normal. After evaluation, the diagnosis was multiple sclerosis. In subsequent statements, he reported, in essence, that the veteran's neurological history, and recollections of service comrades, suggested that the first attack of multiple sclerosis had been in 1945 following a plane crash.

Robert I. Moskowitz, M.D., reported that the veteran was initially seen in 1973 for left knee pain and that in April 1974, atrophy of the quadriceps and calf musculature and diminished vibratory sensation of the left leg were noted. He reported that the "paralysis" that the

veteran had noted on several occasions in his service records could not be explained on the basis of a myelogram, and that he could conceive that the veteran's problem began in the military.

Several statements from family members were received in which they reported their recollections of the veteran's problems with his back and legs since service. Statements from service comrades concerning their recollections of such problems were also provided.

In October 1983, Robert L. Chesanow, M.D., a neurologist, reported that he obtained history from the veteran and his sister, neurological examination, and examination of available military records, and other post service data and that, in essence, the evidence showed

that the veteran's multiple sclerosis began during 1944 or 1945 with a high degree of medical probability. He cited three attacks of paraparesis, with remissions from February 1945 to January 1946, optic neuritis, and the under determination of the total number of service-connected cases of multiple sclerosis from World War II and the Korean Conflict.

The veteran and his spouse provided testimony at a hearing at the regional office in November 1983. A verbatim transcript of the hearing is of record.

In connection with the current appeal, the veteran testified at the May 1989 hearing that he first received treatment in the early part of 1944 for difficulty with numbness in the extremities, the

feet, hands, and visual problems. He also reported that during his training he experienced excessive fatigue. No diagnostic workup was performed at that time. He also recalled his involvement in a plane crash and that he was totally paralyzed from the waist down immediately after the accident. He spent approximately three weeks in the hospital. A therapy program consisted of the use of weights, and swimming was ordered. He recalled that as a freshman in college he tried out for the football team and after practice in the heat, he went through an experience of symptoms of numbness and the tingling sensation of the extremities and was placed in the college infirmary. These symptoms basically cleared up after he gave up football. He used canes for ambulation all through college, as he would

periodically experience fatigue and balance problems. He also recalled episodes of visual problems but not specific dates that these occurred.

The veteran also recalled treatment from several physicians at a time when he had trouble walking and trouble with his back and vision. He recalled that he wore a back brace while in the service after the plane crash. He stated that he wore it off and on while in the service and during college and thereafter for several years. He recalled that Dr. Fredericks was the first neurologist he saw and he made the diagnosis of multiple sclerosis. He also testified further concerning the aircraft accident in service. His spouse provided recollections of his symptoms. A verbatim transcript of the hearing is of record.

## THE LAW AND REGULATIONS

When a claim is disallowed by the Board of Veterans Appeals, it may not thereafter be reopened and allowed, and no claim based upon the same factual basis shall be considered. (38 U.S.C. 4004(b))

When a claimant requests that a claim be reopened after an appellate decision and submits evidence in support thereof, a determination as to whether such evidence is new and material must be made and, if it is, whether it provides a new factual basis for allowing the claim. An adverse determination as to either question is appealable. (38 U.S.C. 4004(b); 38 C.F.R. 19.194)

Service connection may be granted for disability resulting from disease or injury incurred in or aggravated by wartime service. (38 U.S.C. 310)

Where a veteran served 90 days or more during a period of war and multiple sclerosis becomes manifest to a degree of 10 percent within 7 year from date of termination of such service, such disease shall be presumed to have been incurred in service, even though there is no evidence of such disease during the period of service. This presumption is rebuttable by affirmative evidence to the contrary. (38 U.S.C. 301, 312, 313; 38 C.F.R. 3.307, 3.309)

When a reasonable doubt arises regarding service origin, the degree of disability, or any other point, such doubt will be

resolved in favor of the claimant. A reasonable doubt is one which exists because of an approximate balance of positive and negative evidence which does not satisfactorily prove or disprove the claim. It is a substantial doubt and one within the range of probability as distinguished from pure speculation or remote possibility. It is not a means of reconciling actual conflict or a contradiction in the evidence; the claimant is required to submit evidence sufficient to justify a belief in a fair and impartial mind that the claim is well grounded. (38 C.F.R. 3.102)

## DISCUSSION AND EVALUATION

The Board of Veterans Appeals decisions denying service connection for multiple sclerosis in May 1978, October 1984, and

March 1987 are final. No specific allegations of obvious error have been made with respect to these determinations in the current appeal. The question for consideration is, therefore, whether the additional evidence presented creates a new factual basis warranting allowance of service connection. The essential contention is that the Board had not given sufficient weight to statements of private physicians and service comrades and others concerning the manifestations of multiple sclerosis during service or the presumptive period.

The Board has carefully reviewed the record and is of the opinion that the additional evidence consisting of personal hearing testimony does not reasonably establish that the veteran's multiple sclerosis is the result of his

active service. It should be pointed out that the earlier medical opinions concerning the first manifestations of multiple sclerosis are based essentially on history provided by the veteran many years after service. This history is not confirmed by contemporaneous clinical records. The service medical records and the record of treatment he received in the presumptive period do not contain observations or complaints that could reasonably be associated with multiple sclerosis. A plane crash in service as a precipitating cause of his symptoms was not mentioned in the service medical records, on his initial application for compensation or in treatment reports from the early years after service. The evidence, in our opinion, does not raise a reasonable doubt when viewed objectively.

## FINDINGS OF FACT

1. Service connection for multiple sclerosis was considered and denied by the Board of Veterans Appeals in May 1978, October 1984, and March 1987.

2. The evidence received with the reopened claim does not reasonably establish that the veteran's multiple sclerosis was clinically manifested during service or within seven years of his separation from service.

## CONCLUSION OF LAW

The May 1978, October 1984, and March 1987 decisions of the Board of Veterans Appeals denying service connection for multiple sclerosis are final and the

additional evidence does not present a new factual basis warranting service connection therefor. (38 U.S.C. 301, 312, 313, 4004(b); 38 C.F.R. 3.102, 3.307, 3.309, 19.194).

ORDER

Service connection for multiple sclerosis is denied.

ANTHONY FAVA
CHARLES E. EDWARDS, M.D.
H. H. CLARK

NOTICE OF APPELLATE RIGHTS: Under 38 U.S.C. 4066, added by Public Law 100-687, a decision of the Board of Veterans Appeals granting less than the complete benefit, or benefits, sought on appeal is appealable to the United States Court of

Veterans Appeals within 120 days from the date of mailing and the copy of this decision which you have received is your notice of the action taken on your appeal by the Board of Veterans Appeals.

Supreme Court, U.S.
FILED
AUG 1 1994
OFFICE OF THE CLERK

No. 93-1830

(2)

# In the Supreme Court of the United States

OCTOBER TERM, 1994

---

DONALD G. SPENCER, PETITIONER

*v.*

JESSE BROWN, SECRETARY OF VETERANS AFFAIRS

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT*

---

## BRIEF FOR THE RESPONDENT IN OPPOSITION

---

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## QUESTIONS PRESENTED

1. Whether the Veterans' Judicial Review Act, Pub. L. No. 100-687, 102 Stat. 4105 (1988), applies retroactively to petitioner's claim for service-connected disability compensation.

2. Whether petitioner has submitted "new and material evidence" that would permit the reopening of his claim for service-connected disability compensation.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 1 |
| Statement | 2 |
| Argument | 5 |
| Conclusion | 11 |


## TABLE OF AUTHORITIES

Cases:


| | |
|---|---|
| *Landgraf* v. *USI Film Products*, 114 S. Ct. 1483 (1994) | 8, 10 |
| *Rivers* v. *Roadway Express, Inc.*, 114 S. Ct. 1510 (1994) | 9 |
| *United States* v. *Nordic Village, Inc.*, 112 S. Ct. 1011 (1992) | 7 |
| *United States* v. *St. Louis, San Francisco & Texas Ry.*, 270 U.S. 1 (1926) | 10 |
| *United States Dep't of Energy* v. *Ohio*, 112 S. Ct. 1627 (1992) | 7 |
| *United States Fidelity & Guar. Co.* v. *United States ex rel. Struthers Wells Co.*, 209 U.S. 306 (1908) | 10 |
| *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305 (1985) | 5 |


Statutes and regulations:


| | |
|---|---|
| Veterans' Judicial Review Act, Pub. L. No. 100-687, 102 Stat. 4105 (1988) | 4 |
| 38 U.S.C. 1112(a)(4) (Supp. IV 1992) | 3 |
| 38 U.S.C. 5107 (Supp. IV 1992) | 4 |
| 38 U.S.C. 5108 (Supp. IV 1992) | 4, 6, 7 |
| 38 U.S.C. 15110(g) (Supp. IV 1992) | 4, 6, 7 |
| 38 U.S.C. 7104(a) (Supp. IV 1992) | 4 |
| 38 U.S.C. 7104(b) (Supp. IV 1992) | 4, 6, 7 |
| 38 U.S.C. 7104(d)(1) (Supp. IV 1992) | 4 |
| 38 U.S.C. 7251 (Supp. IV 1992) | 4 |
| 38 U.S.C. 7292 (Supp. IV 1992) | 4 |

Statutes and regulations–Continued: Page

38 U.S.C. 7292(d)(2) (Supp. IV 1992) ..... 5
38 U.S.C. 4004(b) (1982) ..... 10
38 C.F.R.:
Section 3.102 ..... 4
Section 3.103(a) ..... 5-6
Section 3.114(a) ..... 6
Section 3.159 ..... 5-6

Miscellaneous:

H.R. Rep. No. 963, 100th Cong., 2d Sess. Pt. 1 (1988) ..... 9

# In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 93-1830

DONALD G. SPENCER, PETITIONER

*v.*

JESSE BROWN, SECRETARY OF VETERANS AFFAIRS

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A2-A23) is reported at 17 F.3d 368. The opinion of the Court of Veterans Appeals (Pet. App. A25-A92) is reported at 4 Vet. App. 283. The opinion of the Board of Veterans' Appeals (Pet. App. A93-A111) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on February 15, 1994. The petition for a writ of certiorari was filed on May 16, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. Petitioner served on active duty with the United States armed forces from March 1944, to February 1946. Pet. App. A3. In 1975, petitioner was diagnosed with multiple sclerosis (MS). *Ibid.* In November 1976, petitioner filed a claim for service-connected disability compensation, based on his MS, with a regional office of the Veterans Administration (now the Department of Veterans Affairs (VA)). *Ibid.* The claim was supported by a statement from a private physician suggesting the possibility that petitioner suffered his "first attack" of MS while on active duty in the spring of 1945. *Id.* at A3-A4, A28. The VA denied his claim based on the absence of evidence demonstrating that petitioner's disability was connected to his service in the military. *Id.* at A4, A28.

In 1977, petitioner submitted additional statements, from private physicians and from lay persons, in support of his contention that his disability was service-connected. Pet. App. A4, A29. Petitioner also testified under oath at a hearing before the VA regional office that he suffered from fatigue and numbness in his legs during and after his military service; that he began to suffer severe back pain and had "trouble ambulating" following an airplane crash in which he had been involved in the spring of 1945; and that he was found to have "a high level of albumin in his urine" during his military service, a condition that petitioner contends is indicative of MS. *Id.* at A29-A30. Petitioner argued that this evidence demonstrated that he suffered from MS during his military service or during the seven-year period immediately following service, which would presumptive-

ly establish that the MS is service-connected.[1] The VA, however, reaffirmed its earlier decision denying petitioner's claim, concluding that the record remained inadequate to demonstrate an entitlement to compensation. *Id.* at A5.

In May 1978, the Board of Veterans' Appeals (Board) affirmed the VA's decision, holding that insufficient evidence had been presented to support a finding that petitioner's MS was service-connected. Pet. App. A5-A6; C.A. App. 117-118. On January 10, 1980, the Board reconsidered and reaffirmed its 1978 decision. Pet. App. A31. The Board held that its May 1978, decision constituted a final determination of petitioner's claim. C.A. App. 128.

In 1983, petitioner submitted additional medical and lay evidence in support of his contention that his MS is service-connected. Pet. App. A31-A33. On October 4, 1984, the Board of Veterans Appeals, after evaluating the additional evidence, concluded that petitioner had failed to present a new factual basis for his claim. *Id.* at A33.

Petitioner again sought to have his claim reopened in 1986. Pet. App. A34. On March 30, 1987, the Board denied that request, concluding that petitioner had failed to establish new factual grounds for his claim. *Ibid.*

In May, 1989, petitioner and his wife testified under oath concerning petitioner's medical condition at a hearing before the VA regional office. Pet. App. A34. On July 23, 1990, the Board again determined that petitioner

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[1] The veterans' benefits statute provides that, for individuals such as petitioner who served in the military "for ninety days or more during a period of war," MS is presumed to be service-connected if it results in "a 10 percent degree of disability or more within seven years from the date of separation from such [military] service." 38 U.S.C. 1112(a)(4) (Supp. IV 1992).

had not demonstrated a new factual basis and therefore declined to reopen his claim. *Id.* at A34-A35.

2. On March 1, 1993, the United States Court of Veterans Appeals (CVA) affirmed the Board's July 23, 1990, decision. The CVA rejected petitioner's argument that the Veterans' Judicial Review Act (VJRA), Pub. L. No. 100-687, 102 Stat. 4105 (1988), required the VA and the Board to conduct de novo review of petitioner's previously disallowed claim. The CVA noted (Pet. App. A43) that Congress has prohibited such claims from being reopened in the absence of "new and material evidence." 38 U.S.C. 5108, 7104(b) (Supp. IV 1992). When the Board has rendered a final decision disallowing an individual's claim, the CVA held that benefits nevertheless can be awarded in response to a subsequently enacted statute, but only where the statute alters the substantive elements of a claim for veterans' benefits. Pet. App. A46 (discussing 38 U.S.C. 5110(g) (Supp. IV 1992)). The CVA noted that the VJRA made important procedural changes governing the adjudication of claims,[2] but did not alter any substantive requirement pertinent to petitioner's claim, and therefore could not be applied to petitioner's claim. Pet. App. A53-A55.

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[2] Among other things, the VJRA established the United States Court of Veterans Appeals, 38 U.S.C. 7251 (Supp. IV 1992), and provided claimants with a right to judicial review of decisions rendered by that court, 38 U.S.C. 7292 (Supp. IV 1992); required the Board to provide a written statement of findings and conclusions that explain and evaluate the evidence presented, 38 U.S.C. 7104(d)(1) (Supp. IV 1992); codified the burden of proof applicable in benefits proceedings in a manner consistent with a pre-existing VA regulation, 38 C.F.R. 3.102 (38 U.S.C. 5107 (Supp. IV 1992)); and codified the right of claimants to a decision of the Board based on consideration of all evidence in the record (38 U.S.C. 7104(a) (Supp. IV 1992)).

Finally, the CVA concluded that petitioner had not presented any "new and material evidence" that would permit the reopening of petitioner's previously disallowed claim. Pet. App. A91. The CVA rejected petitioner's argument that pre-VJRA law prohibited consideration of evidence other than official service department reports and that the Board therefore had ignored the evidence submitted by petitioner. The CVA concluded that the record did not reveal that the VA and the Board departed from their permissible practice of considering all submissions by a claimant before determining whether the information constituted "new and material evidence." *Id.* at A61-A64, A89-A90.

3. The court of appeals affirmed. Pet. App. A2-A23. The court concluded that the VJRA did not alter the nature of petitioner's claim for compensation "such that it became different and distinct from the one previously denied by the Board," and therefore held that de novo review of petitioner's claim was not available. *Id.* at A16-A17. The court of appeals also affirmed the CVA's determination that the evidence presented by petitioner in the 1990 proceeding was not "new and material." *Id.* at A21-A23.[3]

## ARGUMENT

1. a. The administrative system governing the award of service-connected disability benefits operates "with a high degree of informality and solicitude for the claimant." *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 311 (1985); see also 38 C.F.R.

[3] The court of appeals concluded that the CVA did not commit any legal error with respect to that determination, and that it lacked jurisdiction to review the CVA's application of law to the facts of this case. Pet. App. A22-A23; see 38 U.S.C. 7292(d)(2) (Supp. IV 1992).

3.103(a), 3.159. Nevertheless, once a final decision has been rendered denying a veteran's claim, the claim "may not thereafter be reopened and allowed and a claim based upon the same factual basis may not be considered." 38 U.S.C. 7104(b) (Supp. IV 1992). There is an exception to this general rule of finality. That exception permits a claim to be reopened when "new and material evidence is presented or secured" establishing a new factual basis for an award of compensation. 38 U.S.C. 5108 (Supp. IV 1992). The essence of petitioner's submission (Pet. 34-35) is that the enactment of the VJRA requires the reopening of his claim even in the absence of "new and material evidence." The courts below correctly rejected this contention.

Petitioner relies on 38 U.S.C. 5110(g) (Supp. IV 1992), which provides that if compensation "is awarded or increased pursuant to any Act or administrative issue," the award or increase shall take effect no earlier than the effective date of the new enactment. 38 U.S.C. 5110(g) (Supp. IV 1992); see also 38 C.F.R. 3.114(a) (implementing Section 5110(g)). That language of course "presupposes" (Pet. App. A50) that a claim may be reopened in response to certain changes in law. But the VJRA had no impact on *the type* of changes encompassed by Section 5110(g). The courts below properly concluded that that provision applies only to changes in the "requirements for establishing entitlement" to veterans' benefits, because Section 5110(g) applies to awards or increases made "pursuant to" a new statute or administrative issue. The phrase "pursuant to" suggests that Section 5110(g) is limited to statutes and regulations that "provide[] a substantive basis for establishing entitlement to benefits." Pet. App. A51, A54. It makes little sense to state that benefits are awarded

"pursuant to" statutes, like the VJRA, that effect only procedural changes.

Moreover, the interpretation adopted by the courts below properly harmonizes Section 5110(g) and Section 7104(b), which prohibits the "reopen[ing]" of prior claims (in the absence of "new and material evidence," 38 U.S.C. 5108 (Supp. IV 1992)). A claim for compensation filed pursuant to a statute that creates a new substantive basis for entitlement to benefits is "separate and distinct" from a claim that was filed and disallowed prior to the enactment of the statute. Pet. App. A12 (quoting *id.* at A46). In such circumstances, a new claim is being pursued, and the general prohibition against "reopen[ing]" prior disallowed claims does not apply. Here, however, there is no claim different from that which the Board disallowed in May 1978; petitioner has invoked the VJRA not to file a new claim, but to obtain additional review of his prior disallowed claim. That amounts to an attempt to "reopen" the prior claim, in violation of the general rule of finality set forth in Section 7104(b).

Finally, the VJRA is a waiver of sovereign immunity and therefore must be strictly construed in favor of the government. See, *e.g.*, *United States Dep't of Energy* v. *Ohio*, 112 S. Ct. 1627, 1633 (1992); *United States* v. *Nordic Village, Inc.*, 112 S. Ct. 1011, 1014-1015 (1992).[4] This principle counsels against petitioner's broader reading of Section 5110(g), which would encompass procedural, as well as substantive, changes in law.

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[4] Petitioner's attempt (Pet. 40) to distinguish *Nordic Village* is unavailing. Although that case involved a different statutory provision, we rely on *Nordic Village* (as did the court of appeals, Pet. App. A17) only for the well-settled rule that waivers of sovereign immunity are to be construed narrowly.

A. Petitioner's challenge to the decisions below rests primarily on this Court's recent decision in *Landgraf* v. *USI Film Products*, 114 S. Ct. 1483 (1994). The holding of *Landgraf*, however, is that a statute should *not* be given retroactive effect absent evidence of clear congressional intent in favor of retroactivity. *Landgraf*, 114 S. Ct. at 1505.[5] Petitioner cites no persuasive evidence demonstrating that Congress intended to permit the reopening of claims that had already been disallowed and for which "new and material evidence" had not been submitted.

Petitioner attempts to carry his burden under *Landgraf* by suggesting (Pet. 27, 36) that Congress enacted the VJRA because it was concerned about the unfairness of the VA's existing decisionmaking processes. Petitioner's claim is too broad to be meaningful. All legislation implies some level of dissatisfaction with the existing state of affairs.[6] As this Court noted in a case

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[5] There can be no doubt, and petitioner effectively concedes (Pet. 32-37), that he seeks retroactive application of the VJRA. Application of the VJRA to this case would "increase a party's liability for past conduct," *Landgraf*, 114 S. Ct. at 1505, because when the VJRA was signed into law, *no* liability could be imposed on the government with respect to petitioner's claim for compensation in the absence of "new and material evidence"—the Board of Veterans Appeals had issued its final determination more than ten years earlier. Indeed, *Landgraf* presented a stronger case for retroactivity than the present case. *Landgraf* was pending on appeal on the date that a new statute, the Civil Rights Act of 1991, was signed into law, and thus the question was whether the new statute would apply to *pending* cases. Here, in contrast, there was no reviewable claim pending on the date that the VJRA took effect.

[6] We note, however, that petitioner overstates the relevance of any purported flaws of the pre-VJRA administrative system. The legislative history of the VJRA indicates that Congress had

decided with *Landgraf*, the fact that Congress intended to effect changes does not relieve the party arguing for retroactivity from the burden of demonstrating a "clear expression of congressional intent to reach cases that arose before * * * enactment" of the legislation. *Rivers* v. *Roadway Express, Inc.*, 114 S. Ct. 1510, 1516 (1994). Petitioner cannot make that showing simply by averring (Pet. 36, 37) that the result he seeks is "more just" and "benign," cf. *Rivers*, 114 S. Ct. at 1517-1518 (rejecting reliance on "restorative" intent), that no "private rights" would be affected (Pet. 35), or that no "particular private person" (Pet. 36) would be required to pay under his interpretation. Petitioner's various contentions amount to nothing more than a plea for application of different rules of retroactivity against the government "where fairness requires it." Pet. 37. Nothing in *Landgraf* or *Rivers* supports such a rule, and well-settled principles of sovereign immunity strongly counsel against it.[7]

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considerable confidence in the outcomes reached by that system. See H.R. Rep. No. 963, 100th Cong., 2d Sess. Pt. 1, at 15 (1988) ("The [House Committee on Veterans' Affairs] believes that the existing system achieves a high degree of accuracy and fairness."); H.R. Rep. No. 963, *supra*, at 25 ("[I]t is relatively clear that the Committee views with approval most of the procedures adopted by the VA to adjudicate claims."); H.R. Rep. No. 963, *supra*, at 26 ("[T]he substitution of a court to perform the functions presently performed by the BVA is not intended to express displeasure with the existing BVA method of reviewing claims or to imply that the existing review process is unfair. To the contrary, the Committee believes that veterans presently receive every possible consideration when the BVA reviews a case.").

[7] Petitioner also claims (Pet. 37) that the procedural nature of the changes effected by the VJRA "militates in favor of having [his] claim considered within a domain of procedural fairness." It is unclear whether that is merely intended to reiterate petitioner's

2. Petitioner further contends (Pet. 42) that his claim should be reopened because of his earlier reliance on evidence other than official service department reports. According to petitioner, prior to the enactment of the VJRA, only such "official reports," 38 U.S.C. 4004(b) (1982), could constitute new and material evidence for purposes of reopening an otherwise final claim. Petitioner notes that he did not submit any service department reports to the VA or the Board, and contends that the Board therefore must not have considered any of the evidence that he did submit.

There is no indication that the Board ignored any evidence submitted by petitioner. Pet. App. A90-A91. To the contrary, the practice of the VA and the Board was to consider *all* submissions by a veteran in determining whether "new and material evidence" had been pre-

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repeated claim that the result in this case is unjust. To the extent petitioner intends to suggest that retroactivity concerns have no application to procedural rules, *Landgraf* rejected that view. 114 S. Ct. at 1502 n.29; see also *United States* v. *St. Louis, San Francisco & Texas Ry.*, 270 U.S. 1, 3 (1926); *United States Fidelity & Guar. Co.* v. *United States ex rel. Struthers Wells Co.*, 209 U.S. 306, 316 (1908). To be sure, as *Landgraf* acknowledged, certain procedural rules "may often be applied in suits arising before their enactment without raising concerns about retroactivity." 114 S. Ct. at 1502. A new rule of evidence, for example, could be applied if the case has not yet been tried, but not if the case is already on appeal. Cf. *Landgraf*, 114 S. Ct. at 1505 n.34 (noting that "the promulgation of a new jury trial rule would ordinarily not warrant retrial of cases that had previously been tried to a judge"). Those concerns are not implicated here. At the time the VJRA was enacted, the order denying benefits to petitioner was a decade old. Principles of finality strongly counsel against reopening broad categories of closed claims for application of newly adopted procedural rules, where, as here, Congress has given no indication of an intent to do so.

sented. *Id.* at A61-A64. The courts below correctly concluded that this practice was based on a permissible interpretation of applicable pre-VJRA law. *Id.* at A21, A89-A90. Although petitioner argues (Pet. 44) that the agency's general practice was not followed in this case, the CVA found it "clear" that the Board did not reject petitioner's evidence because it did not take the form of official service department reports. Pet. App. A64. The record supports that conclusion, revealing that the Board evaluated the probative value of petitioner's evidence before denying the requests to reopen his claim. See C.A. App. 124-127, 166-172, 186-188, 240-245. Further review of that fact-bound issue is not warranted.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1994

Supreme Court, U.S.
FILED
AUG 23 1994
OFFICE OF THE CLERK

(3)

No- 93-1830

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1994

DONALD G. SPENCER

*Petitioner,*

v.

JESSE BROWN, SECRETARY OF VETERANS AFFAIRS

*Respondent.*

**On Petition of Writ of Certiorari to the United States Court of Appeals for the Federal Circuit**

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## TABLE OF CONTENTS

Table of Authorities . . . . . i

Statutes and Regulations . . . . . ii

Argument . . . . . 1

Conclusion . . . . . 16

**TABLE OF AUTHORITIES**

**CASES**


American Dredging Co. v. Miller, 144 S. Ct. 981 (1994) . . . . . 12

Director, Office of Workers' Compensation Programs, Department of Labor v. Greenwich Collieries, 62 U.S.L.W. 4543 (1994) . . . . 12

King v. St. Vincent's Hospital, 112 S. Ct. 570 (1991) (to be reported at 502 U.S. 215) . . . 14

Landgraf v. USI Film Products, 114 S. Ct. 1483 (1994) . . 2,8,10,15

Rivers v. Roadway Express, Inc., 114 S. Ct. 1510 (1994) . . . . 7,10

United States Dep't of Energy v. Ohio, 112 S. Ct. 1627 (1992) . . . . . 13

United States v. Nordic Village, Inc., 112 S. Ct. 1011 (1992) . . . . . 13

Walters v. National Association of Radiation Survivors, 473 U.S. 305 (1985) . . . . . 3,13

## STATUTES AND REGULATIONS

38 U.S.C. § 5108 (Supp. IV 1992) . . . 3

38 U.S.C. § 5110(g)
(Supp. IV 1992) . . . . . 3,5,7,12

38 U.S.C. § 7104(b) (Supp. IV 1992) . . 5

38 U.S.C. § 5107 (Supp. IV 1992) . . 11

38 C.F.R. § 3.102 (1988) . . . . . 11

IN THE SUPREME COURT OF THE
UNITED STATES
October Term, 1994

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Donald G. Spencer,

Petitioner,

v.

Jesse Brown

Secretary of Veteran Affairs,

Respondent.

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ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

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# REPLY BRIEF FOR PETITIONER

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## ARGUMENT

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1. Respondent disputes neither the importance of this case -- in that the decision below will adversely affect the

rights of primarily older veterans with disabilities (Pet. 28) -- nor that the court below failed to conduct the type of analysis prescribed by Landgraf v. USI Film Products, 114 S. Ct. 1483 (1994). Respondent instead maintains that the decision below is correct, a view that is unfounded and would not, in any event, detract from the appropriateness of review by the Court of the important and unresolved issues presented by this case.

2. The parties appear to agree that the United States has, by statute, indicated its desire to provide benefits to disabled veterans of its armed services, and that the VA[1/] benefits system is designed to operate with "no formal res judicata

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1/ Abbreviations correspond with those used in the Petition.

effect." See Walters v. National Association of Radiation Survivors, 473 U.S. 305, 311 (1985). Thus, a veteran may re-present his claim if there are either (1) new relevant facts, 38 U.S.C. § 5108 (Supp. IV 1992), or (2) new relevant laws, 38 U.S.C. § 5110(g) (Supp. IV 1992) (see Pet. 33-34).

As to the latter, Respondent concedes that the language of 38 U.S.C. § 5110(g) "presupposes" that compensation may be "awarded or increased pursuant to any [new] Act or administrative issue" (Resp't Br. 6). But Respondent's assertion that the statutory language "suggests" that it is limited to only "substantive" changes in the law is meritless (Resp't Br. 6).

Had the statute been amended to change only substantive elements -- for example, to provide that evidence of

fatigue and numbness should be accepted as dating the incipience of MS -- Respondent would concede that a veteran would be afforded de novo consideration. Any award resulting therefrom would be "pursuant to" the new act.

Here, the statute has in fact been amended to specify that, inter alia, a veteran is entitled to a decisional process that requires that his medical evidence be directly addressed, and that if rejected, such rejection be supported by countervailing evidence of record, and that a reasoned explanation for the VA's determination be given. Any resulting award would unquestionably be "pursuant to" this new act. Thus, the phrase "pursuant to," contrary to Respondent's argument (Resp't Br. 6), does not inherently "suggest" any resolution of the

point at issue. Rather, reliance on some other ground of decision is required.

3. Equally invalid is Respondent's claim that its interpretation "harmonizes" Section 5110(g) with 38 U.S.C. § 7104(b) (Resp't Br. 7). Respondent begs the question by asserting that consideration of a veteran's claim under the new VJRA rules would conflict with what Respondent tendentiously labels as the "general rule of finality" embodied in Section 7104(b) (addressing "new and material evidence"). It is just as easy to see the "harmony" of a scheme wherein Section 7104(b) addresses new <u>factual</u> matters, on the one hand, and Section 5110(g) addresses new <u>statutory</u> matters, on the other, without any conflict between their respective

operations. Thus there is simply no force in Respondent's contention.

4. By reduction then, what underlies the viewpoint of Respondent (and of the court below) is its assumption as to the appropriate retroactivity effect to be given procedural, as opposed to substantive, statutory changes. But its position is neither coherent nor consistent with Landgraf. If the statutory scheme involved here were not a benefits program (but were merely a waiver of immunity for the resolution of disputes) Respondent would surely argue, in this very case, that a even substantive change in the basis for compensation to veterans should not be deemed retroactive. However, because this case involves an important public benefits system (and

because Section 5110(g) implicitly provides a window for reconsideration of claims based on statutory changes), such a position would be undercut by virtually all of the considerations set forth in Landgraf[2/]. Respondent, of course,

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2/ If this case involved solely a substantive change in a standard for the award of benefits, the veteran would nevertheless be confronted with (1) the presumption against retroactivity of substantive changes stated in Landgraf, as well as (2) the argument that a mere implication of retroactive application inhering in 38 U.S.C. § 5110(g) was insufficient to overcome such presumption. See Rivers v. Roadway Express, Inc., 114 S. Ct. 1510, 1516 (1994). While Respondent (and the VA) appear willing to concede that claims made pursuant to substantive statutory changes should be considered anew -- under the ideation that the claims are "new", "separate" and "distinct" from those originally presented (Resp't. Br. 7) -- this characterization merely begs the question by assuming that the "new" claims are in fact retroactively available to the veteran.

Properly analyzed under Landgraf, the reason why the veteran would be

(continued...)

concedes that reconsideration of the veteran's claim based on a substantive amendment of the benefits statute would be appropriate, but it does not provide an analytical framework for showing why this should be so (Resp't Br. 7). Accordingly, Respondent lacks a basis for considering the impact of a procedural change in the statute.

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2/(...continued)
entitled to have such a claim considered anew is that allowing him to do so would (a) not burden private rights or undermine the public's expectations regarding proper behavior but rather would fulfill an important benefits objective; (b) not impair a right, not increase liability "for past conduct" or impose new duties with respect to completed conduct; (c) affect only "secondary" conduct; (d) not result in "manifest injustice"; and (e) not require any private person to pay for injuries caused. See Landgraf, 114 S. Ct. at 1502-1505.

5. Here, the law has been amended to adopt important procedural changes based on which a veteran's benefits will be determined. Analytically, all of the factors favoring retroactivity under Landgraf (see note 2 supra) remain applicable; but in addition, there is an even stronger basis for allowing a veteran to take advantage of the new rules, as there is no presumption here against retroactivity.

Respondent incorrectly addresses this issue by asserting that Landgraf requires a presumption that a statute should not be given retroactive effect absent "clear congressional intent" to the contrary (Resp't Br. 8). Such a presumption, however, attaches only to statutory provisions that prescribe new substantive requirements that affect the primary

conduct of persons, particularly private persons, so as not unfairly to undermine their reliance on pre-existing law. Landgraf, 114 S. Ct. at 1502. In contrast, statutes changing procedural rights are not "within the class of laws that are presumptively prospective," see Rivers, 114 S. Ct. at 1515, because, inter alia, such statutes affect only "secondary" conduct -- that is, conduct relating to how a claimant's rights are determined. Landgraf, 114 S. Ct. at 1502.

Respondent's error in this regard is evidenced in its contention that, "application of the VJRA to this case would 'increase a party's liability for past conduct,' Landgraf, 114 S. Ct. at 1505" (Resp't Br. 8 n.5; emphasis added). Benefits derive here from Petitioner's status as a member of the armed services

and the onset of his disability, not from the conduct of a party.

6. The VJRA also effected new substantive changes, which should be available to Petitioner. New Section 5107 provides that a veteran need only advance facts that would "justify a belief" that his claim is "well grounded"; and if the proof is ultimately in equipoise, the veteran must be given "the benefit of the doubt in resolving each" issue. 38 U.S.C. § 5107 (Supp. IV 1992).[3/] The Court has

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3/ Before enactment of the VJRA, the rules governing burden of proof were set forth only in a VA regulation, 38 C.F.R. § 3.102 (1988). Under that regulation, if a "reasonable doubt" arose regarding "service origin," it was to be resolved in favor of the veteran. Unlike the current statutory provision, the rule was "not a means of reconciling actual conflict or a contradiction in the evidence." Id.

just recently held that, "the assignment of the burden of proof is a rule of substantive law." Director, Office of Workers' Compensation Programs, Department of Labor v. Greenwich Collieries, 62 U.S.L.W. 4543, 4544 (1994) (citing American Dredging Co. v. Miller, 144 S. Ct. 981 (1994). Thus, because Respondent has conceded that Section 5110(g) authorizes the retroactive application of substantive changes (Resp't Br. 6-7), and because the decision below erroneously characterized the VJRA as containing solely changes that were "unmistakably procedural," (see Pet. ii), the ruling below merits review, since it is inconsistent with several recent decisions of the Court.

7. Respondent also would improperly skew the analysis here by first characterizing the VJRA as a "waiver of sovereign immunity" [4/] and by then asserting that, as such, it is to be strictly construed "in favor of the government" (Resp't Br.

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4/ It is only through wooden mislabeling that the VJRA can be characterized as a "waiver of sovereign immunity." The willingness of the United States to pay benefits to its disabled veterans -- that is, the basis for its exposure to liability -- is embodied in the statutory scheme that predates the VJRA. This scheme was administered through a decisional mechanism intended to operate with "a high degree of...solicitude for the claimant." Walters, 473 U.S. at 311. The VJRA was enacted solely to ensure that bureaucratically rendered decisions on a benefit claim were in fact fairly rendered decisions. The cases on which Respondent relies, United States Dep't of Energy v. Ohio, 112 S. Ct. 1627, 1633 (1992) and United States v. Nordic Village, Inc., 112 S. Ct. 1011, 1014-1015 (1992), in contrast, involve questions whether the United States has exposed itself to liability at all, through civil suits. Such cases do not bear on the considerations or procedures governing benefit programs.

7). Respondent ignores the contrary "canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." King v. St. Vincent's Hospital, 112 S. Ct. 570, 574 n. 9 (1991) (to be reported at 502 U.S. 215). The Court has not previously reconciled these conflicting rules of construction, and this circumstance provides an additional basis for review. Petitioner wishes to make clear, however, that in its view the canon favoring the government has no logical place within a system explicitly designed to deliver benefits to disabled members of a particularly deserving class and such an interpretation is antithetical to the purpose of the veterans' benefit program.

8. Finally, as to those statutory changes that are purely procedural, their availability to a claimant should depend upon "common sense notions" of fairness in the context of the particular statutory and decisional system that is involved. See Landgraf, 114 S. Ct. at 1502, n. 29. Presented here is the demand by a veteran to receive, for the first time, a fair consideration of all his supporting evidence, and a reasoned response to his claim. His claim was previously denied in a procedural system that Congress has recognized as being adulterated in its operation. In this context, the need for the VA to provide an additional hearing for veterans who, like Petitioner, have the will, determination and conviction that they have been unfairly treated is a very modest price for affording them a

first opportunity to secure a procedurally fair determination of whether they deserve the benefits they claim.

## CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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